DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-246
Title: Genovevo Salinas, Petitioner
v.
Texas
Docketed: August 27, 2012
Lower Ct: Court of Criminal Appeals of Texas
Case Nos.: (PD-0570-11)
Decision Date: April 25, 2012
Rehearing Denied: June 6, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 24 2012	Petition for a writ of certiorari filed. (Response due September 26, 2012)
Sep 26 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Sep 26 2012	Waiver of right of respondent Texas to respond filed.
Oct 3 2012	DISTRIBUTED for Conference of October 26, 2012.
Oct 10 2012	Response Requested . (Due November 9, 2012)
Nov 14 2012	Order extending time to file response to petition to and including December 10, 2012.
Dec 10 2012	Brief of respondent Texas in opposition filed.
Dec 19 2012	Reply of petitioner Genovevo Salinas filed.
Dec 19 2012	DISTRIBUTED for Conference of January 11, 2013.
Jan 11 2013	Petition GRANTED.
Jan 29 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jan 29 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Feb 11 2013	SET FOR ARGUMENT ON Wednesday, April 17, 2013.
Feb 20 2013	Joint appendix filed. (Statement of costs received.)
Feb 20 2013	Brief of petitioner Genovevo Salinas filed.
Feb 26 2013	Brief amicus curiae of American Civil Liberties Union filed.
Feb 27 2013	Brief amicus curiae of American Board of Criminal Lawyers filed.
Feb 27 2013	Brief amici curiae of Rutherford Institute, et al. filed.
Feb 27 2013	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Mar 6 2013	Brief amicus curiae of Wayne County, Michigan filed. (Distributed)

Mar 8 2013	CIRCULATED.
Mar 11 2013	Record from Court Court of Criminal Appeals of Texas is electronic.
Mar 22 2013	Brief of respondent Texas filed. (Distributed)
Mar 28 2013	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Mar 29 2013	Brief amicus curiae of the United States filed. (Distributed)
Mar 29 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 29 2013	Brief amici curiae of Illinois, et al. filed. (Distributed)
Apr 10 2013	Reply of petitioner Genovevo Salinas filed. (Distributed)
Apr 12 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 17 2013	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondent: Alan K. Curry, Houston, Tex.; and Ginger D. Anders, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

12-246

No. 12-___

Supreme Court, U.S.
FILED
AUG 24 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari
to the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Genovevo Salinas respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (Pet. App. 1a) is published at 369 S.W.3d 176. The opinion of the Texas Court of Appeals (Pet. App. 7a) is published at 368 S.W.3d 550. The relevant order of the trial court is unpublished but is referenced at Pet. App. 10a.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on April 25, 2012. Pet. App. 1a. That court denied a timely-filed petition for rehearing on June 6, 2012. Pet. App. 24a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(A).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment states in relevant part that "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

This case presents a fundamental and frequently recurring question of constitutional criminal procedure over which the state and federal courts are openly and intractably divided. Acknowledging this "conspicuous split and lack of guidance from the Supreme Court," a divided Texas Court of Criminal Appeals held here that "pre-arrest, pre-*Miranda* silence is not protected by the Fifth Amendment right against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies." Pet. App. 5a-6a.

1. In the early morning hours in December of 1992, two brothers, Juan and Hector Garza, were shot and killed in Hector's apartment. Responding officers found no evidence of forced entry but did find discarded shotgun shells. A neighbor reported having heard the shots and told the police that the getaway car was a dark colored Camaro or Trans Am. And the police learned from other interviews that the brothers had hosted a party in the apartment the night before the shooting and that petitioner Genovivo Salinas might have been one of the attendees.

After investigating other leads, police proceeded to petitioner's home, where he lived with his parents. There, they discovered that petitioner's mother had a dark blue Camaro or Trans Am. The investigators told petitioner's family about the killings and obtained consent to search the home. During this search, petitioner's father tendered a shotgun to the police. The investigators then asked petitioner to accompany them to the police station for questioning and to "get elimination [finger]prints." 5 Tr. 39.

Petitioner consented to a voluntary interview; he was not under arrest. Pet. App. 23a.

At the station, officers interviewed petitioner for nearly one hour. The officers asked petitioner various questions concerning others who had been at the party – questions such as whether they had any disagreements with or reasons to kill the deceased – and petitioner answered those inquiries. Then, one officer asked petitioner "if the shotgun [his father had given them] would match the shells recovered at the scene of the murder." *Id.* 10a. Petitioner looked down and refused to answer the question. *Id.* 11a.

After the interview, the police arrested petitioner on some outstanding traffic warrants to keep him at the station. *Id.* 12a. Officers then obtained a ballistics report claiming that the casings from the murder scene matched the shotgun from petitioner's house. The police, however, declined to press charges and told petitioner that he was free to go. *Id.* 12a-13a.

Some time later, a friend of petitioner's, Damien Cuellar, appeared at the police station. Cuellar told officers that petitioner had confessed to him that he had killed the brothers. Cuellar said he had declined to offer that information initially, "but after a dream in which he saw the Garza brothers he felt compelled to come forward." *Id.* 13a.

The State then charged petitioner with two counts of murder but did not take him into custody until 2007, when they found him still in the State but living under a new name. *Id.*

2. At trial, the State offered four primary pieces of evidence: (1) Cuellar's dream-induced testimony

concerning petitioner's supposed confession; (2) the fact that petitioner's mother's car was a "potential match[]" to the getaway car; and (3) the ballistics report claiming a match between the murder weapon and the shotgun from petitioner's house; and (4) petitioner's refusal to answer the officer's question whether the ballistics report would assert such a match. *Id.* 17a.

Petitioner declined to testify. His attorney presented evidence that petitioner had been home the night of the killings and argued that someone else must have committed them. He also disputed the reliability of Cuellar's testimony and challenged the usefulness of the police ballistics report. *See, e.g.*, *United States v. Willock*, 696 F. Supp. 2d 536, 564-66 (D. Md. 2010) (noting recent studies evincing a "growing concern regarding the reliability" of ballistics testing).

The prosecution ended in a mistrial when the jury was unable to agree on a verdict.

3. The State then elected to retry petitioner, and introduced the same evidence in the second trial as in the first. When the prosecution elicited the officer's testimony concerning petitioner's refusal to answer his ballistics question, the defense argued that evidence was inadmissible, asserting that petitioner had been entitled to "invoke the Fifth Amendment privilege whether he was in custody or not. He d[id]n't have to talk to the police." Pet. App. 10a. The trial court overruled the objection. Petitioner again declined to testify.

At closing, the prosecution placed considerably more emphasis on petitioner's pre-arrest silence than

in the first trial. Instead of referencing petitioner's refusal to answer the officers' questions concerning ballistics only in passing, *see* First Trial Tr. 26 (June 26, 2008), the prosecutor now aggressively argued that it demonstrated petitioner's guilt:

> The police officer testified that he wouldn't answer that question. . . . You know, if you asked somebody – there is a murder in New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [sic] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say: What are you talking about? I didn't do that. I wasn't there. He didn't respond that way. He didn't say: No, it's not going to match up. It's my shotgun. It's been in our house. What are you talking about? He wouldn't answer that question.

Id. 18a-19a.

This time, the jury returned a guilty verdict and sentenced petitioner to twenty years' imprisonment.

4. The Texas Court of Appeals affirmed. As is relevant here, the court recognized that "[t]he federal courts of appeals are split on the issue" whether "pre-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt." Pet. App. 21a-22a. It also noted that state high courts were similarly divided. *Id.* 20a n.2. The court then agreed with those courts holding that "the Fifth Amendment has no applicability to pre-arrest, pre-*Miranda* silence used as substantive evidence in cases in which the defendant does not testify." *Id.* 22a.

5. The Texas Court of Criminal Appeals granted review and affirmed by a divided vote. Like the Texas Court of Appeals, the Texas Court of Criminal Appeals began by noting "the courts that have weighed in on th[is] issue are split." Pet. App. 4a-5a. Indeed, it emphasized that "[n]early all of the courts that have addressed this issue have noted the conspicuous split and the lack of guidance from the Supreme Court." *Id.* 5a. The Texas Court of Criminal Appeals then sided with those courts holding that "pre-arrest, pre-*Miranda* silence is not protected by the Fifth Amendment right against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies." *Id.* 6a.

Judge Johnson dissented without writing an opinion. *Id.* Judge Meyers did not participate.

REASONS FOR GRANTING THE WRIT

In *Jenkins v. Anderson*, 447 U.S. 231 (1980), this Court reserved the question "whether or under what circumstances prearrest silence" in the face of law enforcement questioning "may be protected by the Fifth Amendment." *Id.* at 236 n.2. Federal and state courts are now openly and intractably divided over the issue. This Court should use this case – in which a divided Texas Court of Criminal Appeals sided with the prosecution side of this split – finally to resolve this important and persistent conflict.

I. Federal And State Courts Are Intractably Split Over Whether The Fifth Amendment Protects A Defendant's Silence In The Face Of Law Enforcement Questioning Before He Was Arrested Or *Mirandized*.

1. The Fifth Amendment's Self-Incrimination Clause precludes any person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Clause guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

Applying this basic principle, this Court held in *Griffin v. California*, 380 U.S. 609 (1965), that the Self-Incrimination Clause forbids comment by the prosecution on a defendant's refusal to testify. *Id.* at 615. "[C]omment on the refusal to testify," this Court explained, "is a remnant of the inquisitorial system of criminal justice." *Id.* at 614 (quotation marks and citation omitted). "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* As Justice Kennedy explained for the Court while applying this rule to sentencing proceedings, "the [*Griffin*] rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition." *Mitchell v. United States*, 526 U.S. 314, 330 (1999).

This Court likewise has held that the prosecution may not comment on a defendant's silence after he has been arrested and read his *Miranda* rights. *See Doyle v. Ohio*, 426 U.S. 610 (1976). This Court reasoned that when the police implicitly advise

someone "that silence will carry no penalty," it violates due process for the prosecution then to use silence against him or even to impeach an explanation of events later offered at trial. *Id.* at 618. "Silence in the wake of these warnings," this Court explained, is "insolubly ambiguous" because it "may be nothing more than the arrestee's exercise of [his] *Miranda* rights." *Id.* at 617.

This Court, however, has never decided "whether or under what circumstances *prearrest* silence" in the face of law enforcement questioning "may be protected by the Fifth Amendment." *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980) (emphasis added). (This issue turns solely on the Fifth Amendment, not due process, because it does not involve any governmental promise other than the one contained in the Self-Incrimination Clause itself.) As the Texas Court of Criminal Appeals noted in this case, "the courts that have weighed in on the issue" – specifically, whether the Fifth Amendment prohibits the prosecution from using such silence as substantive evidence of guilt – "are split" and have frequently noted this "split and the lack of guidance from the Supreme Court." Pet. App. 4a-5a; *see also id.* 20a-22a & n.2; *State v. Kulzer*, 979 A.2d 1031, 269-71 (Vt. 2009) (describing the split as of a few years ago).

2. A majority of the federal appellate and state high courts to address the issue – ten in all – have held that the Fifth Amendment prohibits the prosecutor from commenting, as part of its case-in-chief, on a defendant's refusal to answer law enforcement questioning before he was arrested or *Mirandized*. *See Coppola v. Powell*, 878 F.2d 1562,

1568 (1st Cir. 1989) (Bownes, J., joined by Breyer and Gray, JJ.), *cert. denied*, 493 U.S. 969 (1989); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); *State v. Moore*, 965 P.2d 174, 180-81 (Idaho 1998); *State v. Rowland*, 452 N.W.2d 758, 763 (Neb. 1990); *State v. Cassavaugh*, 12 A.3d 1277, 1285-87 (N.H. 2010); *State v. Leach*, 807 N.E.2d 335, 339-42 (Ohio 2004); *State v. Easter*, 922 P.2d 1285, 1291-93 (Wash. 1996); *State v. Fencl*, 325 N.W.2d 703, 710 (Wis. 1982).[1] In short, these courts believe that because the right to remain silent applies not only at trial but also with respect to law enforcement questioning in the field, "*Griffin*'s prohibition on the use of a

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[1] Unlike other courts that have adopted a categorical bar against using a defendant's pre-arrest pre-*Miranda* silence against him in the prosecution's case-in-chief, *see, e.g.*, *Cassavaugh*, 12 A.3d at 1286-87, the Seventh Circuit generally prohibits use of such of silence but holds that the prosecution may use silence against a defendant in the narrow situation in which, after becoming "aware" that she was a suspect, the defendant "attempted to exculpate herself with some answers and then later refused to answer additional questions *related to those comments*." *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001) (emphasis added). The State, however, has never argued – nor, as the Texas Court of Appeals implicitly recognized, could it – that such a situation is present here. *See* Pet. App. 21a-22a (acknowledging that its decision conflicted with Seventh Circuit law). The police did not make petitioner aware that he was a suspect until they asked him whether the ballistics information would match the shotgun, and petitioner did not offer any exculpatory comments about the shotgun.

defendant's silence as substantive evidence of guilt applies equally to a defendant's silence before trial, and indeed, even before arrest." *Combs*, 205 F.3d at 282 (internal quotation marks and citations omitted).

On the other hand, at least seven and perhaps nine state and federal courts of appeals allow the prosecution to use pre-arrest, pre-*Miranda* silence against defendants. Here, a divided Texas Court of Criminal Appeals in this case joined two federal courts of appeals and two other state high courts in holding that such a reaction to law enforcement questioning "is not protected by the Fifth Amendment right against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies." Pet. App. 6a; *see also United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *State v. Borg*, 806 N.W.2d 535, 541-43 (Minn. 2011) (four-to-three decision); *State v. Kinder*, 942 S.W.2d 313, 325-26 (Mo. 1996), *cert. denied*, 522 U.S. 854 (1997).[2] Two other federal courts of appeals have gone even further, holding that the prosecution may comment on a defendant's pre-*Miranda* silence even *after* he was arrested. *See United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986); *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005), *cert. denied*, 546 U.S. 1151 (2006). These courts, therefore, clearly would allow prosecutorial comment on pre-arrest silence.

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[2] *Accord State v. Masslon*, 746 S.W.2d 618, 625-26 (Mo. App. 1988).

In addition, two other state high courts have held that the prosecution may comment at trial on the fact that a defendant remained silent in the face of a *private* accusation, made in the presence of law enforcement officers before the defendant was arrested. *See Key-El v. State*, 709 A.2d 1305, 1310-11 (Md. 1998), *cert. denied*, 525 U.S. 917 (1998), *overruled on state law grounds by Weitzel v. State*, 863 A.2d 999 (Md. 2004); *State v. Helgeson*, 303 N.W.2d 342, 347 (N.D. 1981). While such silence is at least arguably different than silence in the face of questions directly from law enforcement officers, neither court's reasoning suggested it would distinguish between the two.[3]

3. The need to resolve this conflict is manifest. In 2000, the State of Ohio – supported by a group of other states as amici – urged this Court to resolve the conflict. As the amici put it, states have a "significant interest" in the issue because it "affect[s] the day-to-day criminal investigation by state and local police officers as well as the effective prosecution based on evidence obtained in these investigations." Br. for Illinois et al. as Amici Curiae

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[3] The Texas Court of Criminal Appeals and Texas Court of Appeals also asserted that the Fifth and Ninth Circuits have held that the Fifth Amendment does not apply under the circumstances present here. Pet. App. 5a, 21a-22a (citing *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998). Neither of those cases, however, involved law enforcement questioning; instead, both involved silence in pre-arrest interactions with private parties without any law enforcement agents present. Accordingly, at least on their facts, those cases do not apply here.

at 1, *Bagley v. Combs*, 531 U.S. 1035 (2000) (No. 00-312). "This issue," they continued, "demands uniform treatment among all federal and state courts." *Id.* at 14.

Unfortunately, *Combs* was a poor vehicle for resolving this issue because the Sixth Circuit had granted the state prisoner there habeas relief based not only upon his Fifth Amendment claim but also based upon a totally "independent[]" Sixth Amendment ineffective-assistance violation. *See Combs*, 205 F.3d at 287-89; *see also id.* at 290 (each error independently prejudicial). Accordingly, this Court denied certiorari. 531 U.S. 1035 (2000).

Since that denial, the conflict over whether the Fifth Amendment protects a defendant's silence in the face of pre-arrest and pre-*Miranda* law enforcement questioning has only grown even deeper and more entrenched.[4] Numerous federal appellate courts and state courts of last resort have now weighed in on both sides of the divide. And new courts to confront the issue are no longer contributing to any process of percolation. As the Texas Court of Criminal Appeals did here in a single paragraph of

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[4] The only case between *Combs* and this one that generated a petition for certiorari was *Frazier*. *See* 546 U.S. 1151 (2006) (denying certiorari). But even though the Eighth Circuit in that case resolved the issue on the merits, the case was an inappropriate vehicle for certiorari because the court of appeals also held that "even if [it was] convinced that the prosecutor's reference to Frazier's silence was improper," the error was harmless because other "overwhelming evidence developed at trial establishe[d] Frazier's guilt beyond a reasonable doubt." *Frazier*, 408 F.3d at 1111.

analysis and a dissent without an opinion, they are just choosing sides. Pet. App. 4a-6a.

II. This Court Should Use This Case To Resolve This Important And Frequently Recurring Issue.

This Court should resolve the conflict over the question presented, and this case presents an ideal opportunity to do so.

1. There can be no serious dispute that the question whether the Fifth Amendment protects pre-arrest, pre-*Miranda* silence in the face of law enforcement questioning is extremely important. Police officers and other law enforcement agents across the country attempt to conduct such questioning on a daily basis – approaching everyone from suspects of common street crime to high-ranking executives of Fortune 500 companies. Many of these investigations turn into prosecutions and, like this case, eventually proceed to trial. Thus, as the group of States explained in *Combs*, "[t]he Court's resolution of this question will affect the day-to-day criminal investigation by state and local police officers as well as the effective prosecution based upon the evidence obtained in these investigations." *Combs* Amicus Br. at 1.

2. For two reasons, this case provides a perfect opportunity to resolve the conflict over whether the Fifth Amendment protects a person's refusal to answer such law enforcement questioning. First, this case cleanly presents the issue. Petitioner objected at trial to the prosecution's use of his silence, Pet. App. 2a, and both the Texas Court of Appeals and Texas

Court of Criminal Appeals squarely addressed the issue, *id.* 4a-6a, 18a-23a.

Second, the facts of this case bring the import of the right to remain silent in the face of pre-arrest, pre-*Miranda* questioning into sharp relief. At petitioner's trial, the prosecution not only elicited testimony concerning petitioner's silence from the officer who had questioned him in the stationhouse. It also contended at length in closing argument that "[a]n innocent person" would have answered the officer's questions and that petitioner's refusal to do showed he was guilty. *Id.* 18a-19a. This passionate argument may well have tipped the scales. At petitioner's first trial, the prosecution made no such argument and the jury was unable to reach a verdict. *Id.* 13a. The jury in a second trial based on the same evidence, however, returned a guilty verdict.

III. The Texas Court of Criminal Appeals' Decision Is Incorrect.

The rule forbidding the prosecution from commenting on a defendant's refusal to testify at trial dictates that the prosecution also may not comment on a nontestifying defendant's earlier refusal to respond law enforcement's pre-arrest questioning.

This Court held in *Griffin v. California*, 380 U.S. 609 (1965), that prosecutorial comment on a defendant's failure to testify at trial violates the Fifth Amendment right to remain silent because it treats a mere invocation of this right as substantive evidence of guilt. *See id.* at 615. In other words, such prosecutorial use of a defendant's silence exacts a "penalty" by making a defendant's reliance on his right against self-incrimination "costly." *Id.* at 614.

The same reasoning applies here. The right to remain silent applies not only at trial but also in the face of out-of-court investigatory questioning by law enforcement agents (or other state actors), whether or not the suspect is under arrest. *See Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951). Thus, just as allowing the prosecution to comment on a defendant's failure to testify would penalize him for relying on his Fifth Amendment rights, so too would allowing the prosecution to comment on a defendant's earlier refusal to answer a police officer's investigatory questions. Put another way, when law enforcement agents question someone about his or her potential involvement in criminal activity, the individual has two choices: speak or remain silent. If the latter necessarily creates evidence of guilt, then the right the Constitution grants him to remain silent is little more than a trap for the unwary.

Permitting the prosecution to use pre-arrest, pre-*Miranda* silence against people would also undermine the purposes of the Self-Incrimination Clause. This Court has explained that the right against self-incrimination "reflects many of our fundamental values and most noble aspirations." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). In particular, it reflects:

> our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone

> until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Id. (internal quotation marks and citations omitted); *see also Mitchell v. United States*, 526 U.S. 314, 329 (1999) ("[T]he central purpose of the privilege [is] to protect a defendant from being the unwilling instrument of his or her own condemnation.").

These values and aspirations would be violated just as much – if not more – by prosecutorial comment on silence in the face of noncustodial law enforcement questioning as they are by prosecutorial comment on a defendant's failure to testify. Whenever the prosecution has the power to impose a "penalty . . . for exercising [the] constitutional privilege," *Griffin*, 380 U.S. at 614, the prosecution no longer is required to "shoulder the entire load" of proving its case, *Murphy*, 378 U.S. at 55. And in the context of pre-arrest questioning, allowing prosecutorial comment on a person's silence would permit police officers to manufacture supposedly incriminating evidence simply by asking people sensitive or uncomfortable questions. This could even "encourage improper police tactics, as officers would have reason to delay" arresting suspects and "administering *Miranda* warnings so that they might

use the defendant's pre-arrest silence to encourage the jury to infer guilt." *State v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004).

2. Contrary to the Texas Court of Criminal Appeals' assertions, neither this Court's holding nor the reasoning in Justice Stevens' concurrence in *Jenkins v. Anderson*, 447 U.S. 231 (1980), undermines this straightforward Fifth Amendment analysis.

a. This Court held in *Jenkins* that when a defendant elects to testify at trial, "the Fifth Amendment is not violated by the use of [a defendant's] prearrest silence *to impeach [his] credibility*." *Id.* at 238 (emphasis added). There are two related justifications for this rule, neither of which applies here.

First, the *Jenkins* impeachment rule is necessary to protect against, and to ferret out, perjury. As this Court has explained, "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Harris v. New York*, 401 U.S. 222, 225 (1971). Thus, the *Jenkins* rule "follows the defendant's own decision to cast aside his cloak of silence." *Jenkins*, 447 U.S. at 238; *see also Raffel v. United States*, 271 U.S. 494, 496 (1926) ("The [Fifth Amendment] immunity from giving testimony is one which the defendant may waive by offering himself as a witness. When he takes the stand in his own behalf, he does so as any other witness . . . ." (internal citations omitted)). When the defendant remains silent at trial, he offers no testimony of his own, so this anti-perjury rationale does not apply.

Second, the *Jenkins* impeachment rule "advances the truth-finding function of the criminal trial" by providing the jury with probative evidence to assist it in considering the defendant's in-court testimony. *Jenkins*, 447 U.S. at 238. But this consideration is also absent when the defendant does not testify. When a defendant refuses to answer questions both before *and* during trial, there is no reason to believe that his previous refusal to respond to law enforcement questioning reflected anything more than his basic understanding that he had no duty to speak. *See United States v, Hale*, 422 U.S. 171, 177-80 (1975); *Grunewald v. United States*, 353 U.S. 391, 422-23 (1957).[5] Such an understanding is at least as consistent with innocence as it is with guilt.

b. Nor does Justice Stevens' concurrence in *Jenkins* provide any support for the Texas Court of Criminal Appeals' holding. In that concurring opinion, Justice Stevens stated that he thought that the Fifth Amendment "privilege against compulsory self-incrimination [wa]s simply irrelevant" in the case

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[5] There are, of course, numerous reasons why an innocent person may choose not to speak to law enforcement before trial or to testify. For example, he may be ashamed or embarrassed about certain associations or transactions that he does not want to reveal. He may have a poor memory or cognitive deficits and accordingly feel vulnerable to artful or persistent questioning. Or he may be indignant at an accusation and wish to avoid dignifying it with a response. If the person has prior experience with the criminal justice system or has been advised by an attorney the government is investigating him, odds are even higher that he would decline out of an abundance of caution to speak with the police.

because the defendant had been "under no official compulsion to speak" at the time at issue. 447 U.S. at 241. The Texas Court of Criminal Appeals took this statement to imply that the Fifth Amendment does not apply at all before a person is arrested. Pet. App. 5a-6a.

But Justice Stevens made no such suggestion. To the contrary, he explicitly restricted his expression of the Fifth Amendment's irrelevance to scenarios in which a person's silence "before he has any contact with the police" is at issue. *Id.* at 243. Furthermore, Justice Stevens made clear that when law enforcement officials contact someone and ask him investigatory questions, the Fifth Amendment kicks in because "a citizen has a constitutional right to remain silent when he is questioned." *Id.*; *accord State v. Borg*, 806 N.W.2d 535, 554-55 (Minn. 2011) (Meyer, J., dissenting). For the reasons explained above, there is no reason to protect the right to remain silent in this setting any less than when invoked at trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 24, 2012

APPENDIX

APPENDIX A

COURT OF CRIMINAL APPEALS OF TEXAS

Genovevo SALINAS, Appellant,

v.

The STATE of Texas.

No. PD-0570-11

April 25, 2012

WOMACK, J., delivered the opinion of the Court, in which KELLER, P.J., and PRICE, KEASLER, HERVEY, COCHRAN, and ALCALA, JJ., joined.

The appellant was convicted of murder.[1] The Fourteenth Court of Appeals affirmed the conviction.[2] We granted the appellant's petition for discretionary review on one ground: whether the Court of Appeals erred in holding that the Fifth Amendment right against compelled self-incrimination does not apply to pre-arrest, pre-*Miranda*[3] silence used as substantive evidence of guilt in cases in which a defendant does not testify. Holding that such silence is admissible, we will affirm the Court of Appeals' decision and uphold the appellant's conviction.

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[1] The Fourteenth Court of Appeals' opinion states that the jury found the appellant guilty of two counts of murder. *See Salinas v. State*, ___S.W.3d___ (Tex. App.-Houston [14th Dist.] 2011). Both parties' briefs, as well as the clerk's record, however, indicate that the appellant was found guilty of one count of murder. *See* Tex. Penal Code § 19.02.

[2] *Salinas*, ___S.W.3d___.

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966)

I. BACKGROUND

Houston police officers discovered two homicide victims on the morning of December 18, 1992. An investigation led to the appellant, and he voluntarily accompanied officers to the police station for questioning. For approximately one hour, the appellant answered every question asked. Then, when asked whether shotgun shells found at the crime scene would match a shotgun found at his home, the appellant remained silent, and, according to the interrogating officer, demonstrated signs of deception. A ballistics analysis later matched the shotgun with the casings left at the murder scene. Subsequent investigation led police to a witness who stated that the appellant had admitted murdering the victims. On March 4, 1993, the appellant was charged with murder, though police could not locate him at the time.

After evading arrest for nearly 15 years, the appellant was captured in 2007. His first trial ended in a mistrial. In the appellant's second trial, the State sought to introduce evidence of his silence when he was questioned about the shotgun shells in the 1992 interview. The appellant's trial counsel objected to the State's introduction of this evidence, arguing that the appellant could "invoke the Fifth Amendment privilege whether he was in custody or not." The trial court overruled the objection and allowed the evidence to be introduced. The jury found the appellant guilty of murder and assessed punishment of twenty years' imprisonment and a $5,000 fine.

On appeal to the Fourteenth Court of Appeals, the appellant argued that the trial court erred in admitting evidence of his pre-arrest, pre-*Miranda* silence. The Court of Appeals noted that this issue had

not yet been addressed by our Court or the United States Supreme Court, and that other state courts and federal courts of appeals were divided on whether such silence was admissible.[4] The Court of Appeals sided with those courts holding that it is. Now, in one ground for review, the appellant argues that the Court of Appeals erred in its holding, citing the decisions of those courts that have held that such silence was inadmissible. The State responds that the Court of Appeals correctly held that his silence was admissible, citing the decisions of those courts that have held so.

II. DISCUSSION

The Fifth Amendment to the United States Constitution states, "No person . . . shall be compelled in any criminal case to be a witness against himself."[5] The United States Supreme Court has interpreted this as prohibiting the State from commenting on a defendant's refusal to testify at trial.[6] A defendant's silence *before* trial, however, is considerably less protected from being commented upon at trial. We read the relevant caselaw as holding that the level of protection provided by the Fifth Amendment to pre-trial silence varies according to several factors: (1) whether the defendant was in police custody; (2) whether he was informed of his *Miranda* rights; and (3) whether evidence of such silence is offered as substantive evidence of guilt or elicited from a testifying defendant.

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[4] *Salinas*, ___S.W.3d___; *see also State v. Lee*, 15 S.W.3d 921, 924 n. 5 (Tex. Cr. App. 2000).

[5] U.S. Const. amend. V.

[6] *Griffin v. California*, 380 U.S. 609, 614 (1965).

The Supreme Court has held that a defendant's Fifth Amendment right against compelled self-incrimination is violated if the State is allowed to impeach the defendant's testimony by using his post-arrest, post-*Miranda* silence.[7] The State does *not* violate a defendant's Fifth Amendment rights, however, by cross-examining a defendant as to post-arrest, pre-*Miranda* silence when a defendant chooses to testify.[8] Furthermore, the Supreme Court has held that pre-arrest, pre-*Miranda* silence can be used to impeach a defendant who testifies.[9]

Neither the Supreme Court nor our Court has decided whether pre-arrest, pre-*Miranda* silence (which is at issue here) is admissible evidence against a non-testifying defendant.[10] As the Fourteenth Court of Appeals noted, the courts that have weighed in on

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[7] *Doyle v. Ohio*, 426 U.S. 610 (1976).

[8] *Fletcher v. Weir*, 455 U.S. 603 (1982); *but see also Sanchez v. State*, 707 S.W.2d 575, 579-80 (Tex. Cr. App. 1986) (plurality opinion) (holding that the Texas Constitution provides more expansive protection to a defendant in this circumstance; specifically, that once a defendant has been arrested – regardless of whether he has received his *Miranda* warnings – his silence may not be used against him for any purpose, even impeachment. (citing Tex. Const. art. I, § 10)).

[9] *See Jenkins v. Anderson*, 447 U.S. 231 (1980); *Cisneros v. State*, 692 S.W.2d 78 (Tex. Cr. App. 1985).

[10] At least one notable Texas treatise has presumed that it is. *See* 41 George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice and Procedure* § 16.190 (3d ed. 2011) ("[A] defendant testifying at trial may be cross-examined concerning his failure to make exculpatory claims to police officers in pre-arrest circumstances in which a defendant would be expected to do so. Presumably, such matters could also be proved as evidence of the accused's guilt.").

the issue are split.[11] Those courts holding such silence to be admissible, guided by Justice Stevens' concurring opinion in *Jenkins v. Anderson*,[12] generally reason that the Fifth Amendment right against compulsory self-incrimination is "irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak."[13] Those courts holding such silence to be inadmissible view the Fifth Amendment right more expansively, reasoning that "once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which [the] defendant exercised."[14] Nearly all of the courts that have addressed this issue have noted the conspicuous split and the lack of guidance from the Supreme Court.

In determining that the appellant's silence could be admitted as substantive evidence of guilt, the Court of Appeals-citing the decisions of many state and federal courts[15] – pointed to the reasoning in Justice Stevens'

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[11] *See Salinas*, ___S.W.3d___, n.2 (citing *State v. Lee*, 15 S.W.3d 921, 924 n. 5 (Tex. Cr. App. 2000), our earlier opinion in which we discussed, but did not decide, this issue).

[12] *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring).

[13] *See United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (citing *Jenkins*, 447 U.S. at 241).

[14] *See Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000) (citing *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991)).

[15] *See Oplinger*, 150 F.3d, at 1066-67 (9th Cir. 1998), *overruled on other grounds, United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (per curiam); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *State v. Leecan*, 198 Conn. 517, 504 A.2d 480, 484 (1986); *Key-El v. State*, 349 Md. 811, 709 A.2d 1305, 1310-11 (1998), *overruled by Weitzel v. State*, 384 Md. 451, 863 A.2d 999, 1002 (2004); *State v. Masslon*, 746 S.W.2d 618, 626

Jenkins concurrence.[16] We agree with the Court of Appeals.[17]

The plain language of the Fifth Amendment protects a defendant from *compelled* self-incrimination.[18] In pre-arrest, pre-*Miranda* circumstances, a suspect's interaction with police officers is not compelled. Thus, the Fifth Amendment right against compulsory self-incrimination is "simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak."[19]

III. CONCLUSION

We hold that pre-arrest, pre-*Miranda* silence is not protected by the Fifth Amendment right against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies. The trial court did not err in allowing the State to do just that. We affirm the appellant's conviction.

JOHNSON, J., dissented.

MEYERS, J., did not participate.

(Mo. Ct. App. 1988); *State v. Dreher*, 302 N.J. Super. 408, 695 A.2d 672, 705 (N.J. App. Div. 1997), *disapproved by State v. Brown*, 190 N.J. 144, 919 A.2d 107, 116 n.1 (2007); *State v. Helgeson*, 303 N.W.2d 342, 348-49 (N.D. 1981).

[16] *Jenkins*, 477 U.S., at 241 (Stevens, J., concurring).

[17] We recognize that the facts of *Jenkins* differ from the instant case. We nonetheless find the reasoning in Justice Stevens' concurrence to be relevant and persuasive.

[18] U.S. Const., amend. V.

[19] *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring); *see also Jenkins*, 447 U.S. at 250 n.4 (Marshall, J., dissenting) ("Of course the voluntary decision to remain silent in the absence of any official compulsion does not 'raise any issue under the Fifth Amendment'").

APPENDIX B

COURT OF APPEALS OF TEXAS

Houston (14th Dist.)

Genovevo SALINAS, Applicant,

v.

The STATE of Texas, Appellee.

No. 14-09-00395-CR

March 17, 2011

Panel consists of Justices ANDERSON, FROST, and BROWN.

OPINION

JEFFREY V. BROWN, Justice.

A jury found appellant Genovevo Salinas guilty of two counts of murder and sentenced him to twenty years' imprisonment and a $5,000 fine. Salinas appeals his conviction contending that: (1) his attorney rendered ineffective assistance at trial by failing to object to improper opinion testimony regarding Salinas's truthfulness, and (2) the trial court improperly admitted evidence of Salinas's silence during a pre-arrest interview. We affirm.

I

Genovevo Salinas was convicted of murdering brothers Juan and Hector Garza in the early morning hours of December 18, 1992, after a night of partying at Hector's apartment. Hector's next-door neighbor, Martha Trevino, testified she was awakened around 6:30 or 6:45 a.m. by a "banging noise," which she

thought was a gunshot, followed by "a scream . . . like someone was scared" and more gunshots. She looked out a window and saw a man, whom she thought to be in his twenties, wearing a white hat and a long tan coat with a bulge in the side. He ran down a flight of stairs to the street where he jumped into the passenger seat of a waiting car and sped away.

Paramedics were already on the scene when Houston Police Department officers Kari Richards and Cynthia Miller arrived shortly after 7:00 a.m. The officers learned Juan was dead inside the apartment. Hector was still alive but would be later pronounced dead at the hospital. The officers were unable to locate any witnesses at the scene except for Trevino, who described the getaway car as dark-colored Camaro or Trans Am. Crime Scene Unit officer James Davis investigated the murder scene and found no signs of forced entry or any weapons in the house. He recovered six shotgun shells from around the doorway of the apartment and in the living room. Investigators canvassed the apartment complex but were unable to identify any suspects.

Police were eventually able to identify some of the people who attended the party the night before the shooting, and several cooperated with the investigation. Alberto "Flaco" Paredes testified he dropped Juan off at the apartment after work. He also testified that he had seen a black Trans Am in the area a few weeks before the shooting and saw the same car in the apartment complex parking lot the night before the shooting. Gilbert "Roland" Ledesma testified that two men he did not know left the party in a dark-colored Trans Am. Also at the party was Mike Provazek, who referred police to Damien Cuellar.

Cuellar apparently was not at the apartment but had information that led police to Salinas. Although it is not clear from the trial transcript, it appears Cuellar either told police Salinas was at the party the night before the shooting, that Salinas owned a shotgun, or both.

Investigators went to Salinas's home, where he lived with his parents. In the driveway was both a red Camaro or Trans Am and a dark blue Camaro or Trans Am. Police would later learn that Salinas owned the red car while his mother drove the dark blue car. The investigators told the Salinas family about the murder investigation and obtained consent to search the home. Salinas's father tendered a shotgun to the police. Salinas agreed to voluntarily accompany the officers to a police station for questioning.

Sergeant C.E. Elliott of the Houston Police Department testified at trial that he questioned Salinas at the police station for nearly an hour. During the questioning, Salinas told Sergeant Elliott he knew the Garza brothers through Mike Provazek and had visited the apartment three or four times before the shooting. According to Sergeant Elliott's testimony, Salinas said he had no disagreement with either of the Garza brothers and did not own any weapons aside from the shotgun police took into custody. At that point in Sergeant Elliott's testimony, the prosecutor approached the bench, where the following exchange took place:

> Ms. Garcia [Prosecutor]: Your Honor, there was a Motion in Limine granted that we should not be going into the defendant remaining silent when asked if the ballistics from his shotgun were going to match the shotgun shells found at

the apartment. And at this time, we'd like to be able to go into that and show Sergeant Elliott's testimony. The defendant was not in custody at this time. He was free to leave and he was merely there for investigatory purposes.

The Court: Was this part of the same conversation that we just heard?

Ms. Garcia: Yes, Your Honor, same conversation.

Mr. McWilliams [Salinas's counsel]: Judge, I renew my same objection, that he has – he can invoke the Fifth Amendment privilege whether he was in custody or not. He doesn't have to talk to the police.

The Court: Okay, I agree, but unless you know that, in fact, he did do that.

Mr. McWilliams: He remained silent, Judge.

The Court: Okay. Thank you.

The court went off the record before Sergeant Elliott's examination resumed. A little later, the following exchange, which forms the basis of both of Salinas's issues on appeal, took place:

Q. Did you ask him, Sergeant Elliott, if the shotgun in question here would match the shells recovered at the scene of the murder?

A. Yes.

Mr. McWilliams: I renew the objection.

The Court: The objection is overruled.

Q. (By Ms. Garcia) You can answer the question.

A. Yes, I did ask him that.

Q. And what was his answer?

A. He did not answer.

Q. Did he make any motions after that? Did he–

A. Yes.

Q. What did he do?

A. Showed signs of deception.

Q. And what were they?

Mr. McWilliams: Object to that, Judge, as calling for speculation.

The Court: Sustained.

Mr. McWilliams: I ask that the jury be instructed to disregard that.

The Court: The jury – the objection is sustained. The jury will disregard the last statement of the officer.

Q. (By Ms. Garcia) Sergeant Elliott, what specifically did the defendant do after he remained silent when you asked him that question?

A. Looked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up.

Q. Did you continue to question him after that?

A. Yes.

Q. And did you ask him – did he answer any more questions?

A. Yes.

* * *

Q. So, Sergeant Elliott, approximately how many questions would you say the defendant answered on that evening of your conversation?

A. I've never counted the questions before because this was just talking.

Q. Well, let me ask it this way if that's difficult to answer. About how long did this conversation last, if you remember?

A. Two minutes short of an hour.

Q. So, in this [sic] 58 minutes that you talked to Genovevo Salinas on January 28th of 1993, how many questions did he not answer?

A. One.

* * *

Q. So, what changed before this conversation to alter this conversation to cause you to take him into custody?

A. My opinion.

Q. And how did your opinion change?

A. I had the opinion that he was being deceptive and lying to me and I wanted to hold on to him.

After the interview, Sergeant Elliott arrested Salinas on some outstanding traffic warrants. The ballistics analysis matched Salinas's shotgun with the casings left at the murder scene. However, the Harris

County District Attorney's office declined charges, and Salinas was released. Police procured an additional statement from Cuellar, who, according to Sergeant Elliott, came to the police station unannounced and unsolicited to offer a third statement in which he said Salinas confessed he had murdered the Garza brothers. Cuellar testified that Salinas was his friend and that he hoped police would solve the murder without his help, but after a dream in which he saw the Garza brothers he felt compelled to come forward. Salinas was then charged with murder but eluded arrest until 2007, when he was arrested while maintaining a false identity. Salinas's first trial resulted in a mistrial, but the jury in his second trial found him guilty and sentenced him to twenty years' imprisonment and a $5,000 fine.

II

Salinas's first issue is his ineffective-assistance-of-counsel claim. He complains that his trial counsel failed to object when Sergeant Elliott opined that Salinas was "deceptive and lying." Salinas argues this testimony was an inadmissible opinion of Salinas's truthfulness, and trial counsel's failure to object prejudiced his defense.

A

An accused is entitled to reasonably effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *King v. State,* 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). In reviewing claims of ineffective assistance of counsel, we apply a two-prong test. *See Mallett v. State,* 65 S.W.3d 59, 62 (Tex. Crim. App. 2001). To establish ineffective assistance, an appellant must prove by a preponderance of the

evidence that (1) his trial counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Strickland,* 466 U.S. at 687; *Mallett,* 65 S.W.3d at 62-63. If a criminal defendant can prove that trial counsel's performance was deficient, he must still affirmatively prove that counsel's actions prejudiced him. *Thompson v. State,* 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). To demonstrate prejudice, a defendant must establish a reasonable probability that the result of the proceeding would have been different if trial counsel had acted professionally. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mallett,* 65 S.W.3d at 63.

When evaluating a claim of ineffective assistance, the appellate court looks to the totality of the representation and the particular circumstances of each case. *Thompson,* 9 S.W.3d at 813. In making such an evaluation, any judicial review must be highly deferential to trial counsel and avoid the distorting effects of hindsight. *Ingham v. State,* 679 S.W.2d 503, 509 (Tex. Crim. App. 1984) (citing *Strickland,* 466 U.S. at 689). Accordingly, there is a strong presumption that counsel's conduct fell within a wide range of reasonable representation. *Salinas v. State,* 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). The appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson,* 9 S.W.3d at 813 (citing *Cannon v. State,* 668 S.W.2d 401, 403 (Tex. Crim. App. 1984)). To overcome the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively

demonstrate the alleged ineffectiveness. *Id.* at 814. Direct appeal is usually an inadequate vehicle for raising such a claim because the record is generally undeveloped. *Goodspeed v. State,* 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). But, when no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as he did. *Andrews v. State,* 159 S.W.3d 98, 102 (Tex. Crim. App. 2005).

B

The determination of a witness's truthfulness lies solely within the jury's province. *Yount v. State,* 872 S.W.2d 706, 710 (Tex. Crim. App. 1993). Texas Rule of Evidence 702 prohibits expert witnesses from directly testifying that a particular witness is truthful. Tex. R. Evid. 702; *see Yount,* 872 S.W.2d at 711; *Schutz v. State,* 957 S.W.2d 52, 59 (Tex. Crim. App. 1997). Non-expert testimony may be offered to support the credibility of a witness by offering an opinion or reputation evidence as to the witness's character for truthfulness or untruthfulness, but lay witnesses may not testify to the witness's truthfulness in the particular allegations. *See* Tex. R. Evid. 608(a)(1); *Schutz,* 957 S.W.2d at 72. While the prosecutor did not directly ask Sergeant Elliott for his opinion as to Salinas's truthfulness, Sergeant Elliott's response can be understood only as a statement that he generally disbelieved Salinas's insistence that he was not involved in the murders. This assessment invaded the province of the jury; it would have been proper for defense counsel to both object to this testimony and

request an instruction to disregard Sergeant Elliott's statement. *See Yount,* 872 S.W.2d at 710-11.

Presuming without deciding that counsel's failure to object to this testimony would satisfy the first prong of *Strickland,* appellant's ineffective-assistance claim still fails because the second *Strickland* prong is not satisfied. Salinas has not shown a reasonable probability that, but for counsel's presumptively deficient performance, the result of the trial would have been different. *See Strickland,* 466 U.S. at 687, 104 S.Ct. 2052; *Mallett,* 65 S.W.3d at 63.

It is true that other courts have found that a failure to object to improper opinion testimony was sufficient to undermine confidence in the outcome of the case. *See Fuller v. State,* 224 S.W.3d 823, 836-37 (Tex. App.-Texarkana 2007, no pet.); *Sessums v. State,* 129 S.W.3d 242, 248 (Tex. App.-Texarkana 2004, pet. ref'd); *Miller v. State,* 757 S.W.2d 880, 884 (Tex. App.-Dallas 1988, pet. ref'd); *Garcia v. State,* 712 S.W.2d 249, 253 (Tex. App.-El Paso 1986, pet. ref'd). However, each of these instances arose from sexual-assault or indecency-with-a-child cases in which, as the *Fuller* court recognized, "the victim's credibility was the only real issue at trial and counsel repeatedly or entirely failed to object to the introduction of testimony on the truthfulness and credibility of the victim's allegations." *Fuller,* 224 S.W.3d at 836. In these cases, the deleterious effect of counsel's failure to object to improper opinion testimony was worsened because the allegations hinged on the victim's credibility.

We previously noted this distinction in *Lane v. State,* another sexual-assault-against-a-child case in which trial counsel failed to object to two expert reports containing opinion testimony concerning the

complainant's truthfulness. 257 S.W.3d 22, 27 (Tex. App. - Houston [14th Dist.] 2008, pet. ref'd). We held the second *Strickland* prong had not been satisfied because the complainant's sister offered testimony corroborating the complainant's allegations. *Id.* at 28-29. Therefore, "resolution of the credibility issue was not dependent upon the challenged expert testimony." *Id.* at 29.

Similarly, the case before us does not hinge on a single witness's credibility. The evidence against Salinas includes Cuellar's testimony that Salinas confessed to the crimes, ballistics testing that matches a shotgun in the Salinas family home to the crime scene, and two cars at the Salinas family home that are potential matches of the car Martha Trevino described as fleeing the apartment complex immediately after the shootings. Additionally, we note that the failure to object to improper opinion testimony in this case occurred only once. Moreover, the State did not ask the witness to opine on Salinas's truthfulness; instead, the witness offered the opinion as an answer to why he arrested Salinas. By contrast, in the sexual-assault-against-a-child cases in which a *Strickland* claim was sustained, counsel "repeatedly or entirely failed to object to the introduction of testimony on the truthfulness and credibility of the victim's allegations." *Fuller,* 224 S.W.3d at 836. It has long been a principle of an ineffective-assistance-of-counsel analysis that "[a]n isolated failure to object to certain procedural mistakes or improper evidence does not constitute ineffective assistance of counsel." *Ingham,* 679 S.W.2d at 509. We overrule Salinas's first issue.

III

In his second issue Salinas asserts the trial court erred in admitting testimony of his pre-arrest, pre-*Miranda* silence. Sergeant Elliott testified that Salinas remained silent when asked if ballistics testing on the shotgun his father surrendered to police would match the shell casings found at the murder scene. According to Sergeant Elliott, Salinas showed "signs of deception" when he failed to respond: looking down at the floor, shuffling his feet, biting his bottom lip, clinching his hands in his lap, and tightening up. Sergeant Elliott further testified that Salinas answered every question but this one during the nearly hour-long interview. Defense counsel objected to the testimony on the grounds that Salinas had invoked his Fifth Amendment privilege against self-incrimination by remaining silent. The trial court overruled the objection. During closing argument, the prosecutor argued, over defense counsel's objection, that Salinas's silence was evidence of his guilt:

> The police officer testified that he wouldn't answer that question. He didn't want to answer that. Probably the first time he realizes you can do that. What? You can compare those? You know, if you asked somebody – there is a murder in New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [sic] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say: What are you talking about? I didn't do that. I wasn't there. He didn't respond that way. He didn't say: No, it's not going to match up. It's my shotgun. It's

been in our house. What are you talking about? He wouldn't answer that question.

We must determine whether the Fifth Amendment prohibits the use of Salinas's pre-arrest, pre-*Miranda* silence as substantive evidence of his guilt.

The law is clear that if a defendant testifies, his pre-arrest silence can be used to impeach him. *See Jenkins v. Anderson,* 447 U.S. 231, 238-40 (1980). The use of pre-arrest silence to impeach does not violate the Fifth Amendment because "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." *Id.* at 238. Still, the United States Supreme Court has yet to decide what protections, if any, the Fifth Amendment affords to pre-arrest silence when the defendant does not testify and his silence is introduced by the State not for impeachment but in its case-in-chief.[1]

There is little precedent from Texas courts to provide guidance. In *State v. Lee,* the prosecutor referred to the defendant's pre-arrest silence in an

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[1] The question before the *Jenkins* court was whether pre-arrest silence could be used to impeach a testifying defendant. The Court had previously held that cross-examining a testifying defendant at his second trial with his decision not to testify at his first trial was not an impermissible burden on the defendant's Fifth Amendment rights. *See Raffel v. United States,* 271 U.S. 494, 499 (1926). The *Jenkins* court held a testifying defendant could be impeached with pre-arrest silence because "the rule of *Raffel* clearly permits impeachment even if the pre[-]arrest silence were held to be an invocation of the Fifth Amendment right to remain silent." *Jenkins,* 447 U.S. at 235 n.2. Accordingly, the *Jenkins* court did not consider whether or under what circumstances pre-arrest silence may be protected by the Fifth Amendment. *See id.*

opening statement. 15 S.W.3d 921, 922 (Tex. Crim. App. 2000), *overruled on other grounds, Ex Parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). The Court of Criminal Appeals determined that, under the uncertain state of the law at that time, the prosecutor's actions could not have been intentional or reckless and clearly erroneous.[2] *Id.* at 924-26. A sister court of appeals has addressed the issue, but did not ultimately decide it.[3] *Hennessy v. State*, 268 S.W.3d

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[2] The court in *Lee* provided a survey of decisions from other states addressing this issue. 15 S.W.3d at 924 n.5. Some courts have held that pre-arrest, pre-*Miranda* silence is not admissible as substantive evidence of guilt. *State v. Moore*, 131 Idaho 814, 965 P.2d 174, 180 (1998); *State v. Dunkel*, 466 N.W.2d 425, 428-29 (Minn. Ct. App. 1991); *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758, 763-64 (1990); *People v. DeGeorge*, 73 N.Y.2d 614, 543 N.Y.S.2d 11, 541 N.E.2d 11, 13 (1989); *Hartigan v. Commonwealth*, 31 Va. App. 243, 522 S.E.2d 406, 410 (1999); *State v. Easter*, 130 Wash.2d 228, 922 P.2d 1285, 1291-92 (1996); *Tortolito v. State*, 901 P.2d 387, 390 (Wyo. 1995). Courts in other states have held that pre-arrest, pre-*Miranda* silence does not implicate the Fifth Amendment. *State v. Leecan*, 198 Conn. 517, 504 A.2d 480, 484 (1986); *Key-El v. State*, 349 Md. 811, 709 A.2d 1305, 1310-11, *overruled by Weitzel v. State*, 384 Md. 451, 863 A.2d 999, 1002, *cert. denied*, 525 U.S. 917 (1998); *State v. Masslon*, 746 S.W.2d 618, 626 (Mo. Ct. App. 1988); *State v. Dreher*, 302 N.J. Super. 408, 695 A.2d 672, 705 (App. Div. 1997), *disapproved by State v. Brown*, 190 N.J. 144, 919 A.2d 107, 116 n.1 (N.J. 2007), *cert. denied*, 152 N.J. 10, 702 A.2d 349 (1997), *cert. denied*, 524 U.S. 943 (1998); *State v. Helgeson*, 303 N.W.2d 342, 348-49 (N.D. 1981).

[3] In *Hennessy*, the Waco court of appeals cited several commentators who have written on this issue and noted the split of authority. 268 S.W.3d at 161 n.2. Some have concluded that pre-arrest silence ought to be protected by the Fifth Amendment and inadmissible as substantive evidence of guilt. *See* Meaghan Elizabeth Ryan, Comment, *Do You Have the Right to Remain Silent? The Substantive Use of Pre-Miranda Silence*, 58 ALA. L. REV. 903 (2007); Sara Ciarelli, *Pre-arrest Silence: Minding that*

153, 161 (Tex. App.-Waco 2008, pet. ref'd) (assuming without deciding Fifth Amendment does not permit use of pre-arrest silence as substantive evidence of guilt).

The federal courts of appeals are split on the issue. The First, Sixth, Seventh, and Tenth Circuits have held that pre-arrest, pre-*Miranda* silence is not admissible as substantive evidence of guilt. *Combs v. Coyle,* 205 F.3d 269, 283 (6th Cir. 2000), *cert. denied,* 504 U.S. 977 (1992); *United States v. Burson,* 952 F.2d 1196, 1200-01 (10th Cir. 1991), *cert denied,* 503 U.S. 997 (1992); *Coppola v. Powell,* 878 F.2d 1562, 1568 (1st Cir. 1989), *cert denied,* 493 U.S. 969 (1989); *United States ex rel. Savory v. Lane,* 832 F.2d 1011, 1017-18 (7th Cir. 1987). The Fifth, Ninth, and Eleventh Circuits, on the other hand, have held that pre-arrest,

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Gap Between Fourth Amendment Stops and Fifth Amendment Custody, 93 J. CRIM L. & CRIMINOLOGY 651 (2003); Marcy Strauss, *Silence,* 35 LOY. L.A. REV. 101 (2001); Maria Noelle Berger, Note, *Defining the Scope of the Privilege Against Self-Incrimination: Should Prearrest Silence be Admissible as Substantive Evidence of Guilt?,* 1999 U. ILL. L. REV. 1015 (1999); Jane Elinor Notz, Comment, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You,* 64 U. CHI. L. REV.1009 (1997).

Others have not. *See* Michael J. Hunter, *The Man on the Stairs Who Wasn't There: What Does a Defendant's Pre-arrest Silence Have to do with Miranda, the Fifth Amendment, or Due Process?,* 28 HAMLINE L. REV. 277 (2005); Adam M. Stewart, *The Silent Domino: Allowing Pre-arrest Silence as Evidence of Guilt and the Possible Effect on Miranda,* 37 SUFFOLK U.L. REV. 189 (2004); Jeffrey D. Waltuck, Comment, *Remaining Silent: A Right with Consequences,* 38 J. MARSHALL L. REV. 649 (2004); Stefanie Petrucci, Comment, *The Sound of Silence: The Constitutionality of the Prosecution's Use of Prearrest Silence in its Case-in-Chief,* 33 U.C. DAVIS L. REV. 449 (2000).

pre-*Miranda* silence is admissible as substantive evidence of guilt. *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998), *overruled on other grounds, United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (per curiam); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991).

We agree with the Fifth, Ninth, and Eleventh Circuits. The Fifth Amendment provides that "[n]o person . . . shall be *compelled* in any criminal case to be a witness against himself." U.S. Const. amend. V (emphasis added). A plain reading of the amendment reveals that only government compulsion triggers its protections against self-incrimination. The Fifth Amendment does not "preclude the proper evidentiary use and prosecutorial comment about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference." *Zanabria*, 74 F.3d at 593 (emphasis in original). The otherwise proper acquisition or use of evidence which does not involve compelled testimonial self-incrimination of some sort does not offend the Fifth Amendment. *See Fisher v. United States*, 425 U.S. 391, 399 (1976). Absent a showing of government compulsion, the Fifth Amendment simply has nothing to say on the admissibility of pre-arrest, pre-*Miranda* silence in the State's case-in-chief. We therefore hold the Fifth Amendment has no applicability to pre-arrest, pre-*Miranda* silence used as substantive evidence in cases in which the defendant does not testify.

In his concurrence in *Jenkins*, Justice Stevens first advanced the rationale supporting our holding. Because the privilege against compulsory self-incrimination is irrelevant to whether one remains

silent when under no official compulsion to speak, Justice Stevens would have rejected the defendant's Fifth Amendment claim. *See Jenkins*, 447 U.S. at 241, 100 S. Ct. 2124 (Stevens, J., concurring). We agree with Justice Stevens that the proper inquiry is "whether the petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent." *Id.* at 241, 243–44. A contrary view ignores the unambiguous words of the Fifth Amendment. *See Oplinger*, 150 F.3d at 1067.

Salinas does not argue he was in custody during the interview, and Sergeant Elliott testified Salinas was never handcuffed and was free to leave. Salinas's interview is therefore properly categorized as a voluntary encounter with police. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991); *State v. Larue*, 28 S.W.3d 549, 553 n. 8 (Tex. Crim. App. 2000). *Miranda* warnings, therefore, were neither issued nor required. There was no government compulsion in the pre-arrest, pre-*Miranda* questioning in which Salinas voluntarily participated for almost an hour. Accordingly, the Fifth Amendment privilege against self-incrimination was not triggered and did not prevent the State from offering Salinas's failure to answer the question at issue. *See Oplinger*, 150 F.3d at 1067. We overrule Salinas's second issue.

For the foregoing reasons, we affirm the trial court's judgment.

APPENDIX C

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS

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Wednesday, June 06, 2012

Re: Case No. PD-0570-11 Trial Court Case No. 656545

COA#: 14-09-00395-CR

STYLE: SALINAS, GENOVEVO

On this day, the Appellant's motion for rehearing has been denied.

Louise Pearson, Clerk

NEAL DAVIS
ATTORNEY AT LAW
917 FRANKLIN ST SUITE 600
HOUSTON TX 77002

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 12-246

In The
Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petitioner presents the following question for review:

> Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.

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STATEMENT

I. The offense.

During the early morning hours of December 18, 1992, petitioner shot twenty-six year old Juan Garza, the complainant, along with his twenty-seven year old brother, Hector Garza, at Hector's apartment in Houston, Harris County, Texas. Record RRIV-41, 69, 71, 168, 171, 179-180, 183-185, 189, 191, 224. Juan incurred three shotgun wounds of the back and a shotgun wound of the chest; he died as a result of two of the gunshot wounds of the back. Record RRIV-234-236, 240-252; State's Exhibit 34. Hector incurred a shotgun wound of the left shoulder and a shotgun wound of the back; he died as a result of the shotgun wound of the left shoulder. Record RRIV-234-236, 252-254; State's Exhibit 35.

II. The noncustodial interview.

On January 28, 1993, officers went to petitioner's residence and met petitioner and his father. Record RRV-28-29. The officers explained they were investigating a murder and asked if petitioner had a shotgun. Record RRV-29. Petitioner signed a written voluntary consent to search his residence. Record RRV-30-31; State's Exhibit 26. Officers asked for a shotgun. Record RRV-29, 32. Petitioner responded that his father had a shotgun. Record RRV-32-33. Petitioner's father brought the shotgun to the officers. Record RRV-32, 36; State's Exhibit 25. Petitioner knew the officers were conducting a murder

investigation. Record RRV-36. Petitioner offered no explanation when the shotgun was turned over to the police. Record RRV-35, 37-38.

Officers asked petitioner to come downtown to talk to them and provide his fingerprints. Record RRV-39-40. Petitioner agreed to go with the officers. Record RRV-40. Petitioner was not handcuffed. Record RRV-40. Petitioner was free to leave. Record RRV-40. Petitioner was not in custody. Record RRV-40. Upon arrival at the station, an officer engaged petitioner in a question-and-answer interview. Record RRV-40. The officer asked petitioner about Juan and Hector, how he knew them, when was the last time he had been there, and that type of thing. Record RRV-40. Petitioner responded that he knew them through Mike Provazek, he had been to the apartment a total of three to four times, and he had been over to the apartment the night before the killing. Record RRV-40-43.

The officer asked petitioner about the night before the murders and petitioner responded that he had been to the apartment with Mike. Record RRV-42-43, 47. The officer asked petitioner about Damien Cuellar, and petitioner responded that Damien was his and Mike's friend. Record RRV-43. The officer asked petitioner about any disagreements or arguments any of the parties may have had, and petitioner responded that there had not been any disagreements or arguments with Juan and Hector. Record RRV-43-44.

The officer asked petitioner if he had any weapons other than the shotgun, and petitioner responded that he had no other weapons. Record RRV-44. Near the end of the almost hour-long noncustodial interview, the officer asked petitioner "if the shotgun [officers recovered from petitioner's residence] would match the shells recovered at the scene of the murder?" Record RRV-40, 44. The officer testified, "[h]e did not answer." Record RRV-44. The officer further testified, without objection, that petitioner "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." Record RRV-44-45. The officer continued to ask petitioner questions, and petitioner continued to answer them. Record RRV-45.

The officer asked petitioner where he was at the time of the murder, and petitioner responded that he was at home. Record RRV-45-46. The officer asked petitioner why he was not at work that day, and petitioner responded that he did not go to work because he had been hung over, but that he had called in and said he had car trouble. Record RRV-46. The officer asked petitioner if anybody had seen him at home during the time of the murder, and petitioner responded that no one had seen him or could corroborate what he was saying. Record RRV-46.

During the 58 minute interview, petitioner answered all but one question. Record RRV-47.

III. The trial court proceedings.

On March 4, 1993, petitioner was charged by indictment in state district court with the offense of murder of Juan Garza. Record CRI-7; *see* Former TEX. PENAL CODE §19.02(a) (current version at TEX. PENAL CODE ANN. §19.02(b) (Vernon 2011)). Petitioner entered a plea of not guilty. Record RRIII-3-4; CRII-477. The jury found petitioner guilty of murder. Record RRVIII-3; CRII-477. The jury further found petitioner had used or exhibited a deadly weapon, namely, a firearm, and the trial judge entered a deadly weapon finding. Record RRVIII-3; CRII-466, 477. The jury assessed punishment at 20 years' imprisonment and a $5,000 fine, and the trial court sentenced petitioner accordingly. Record RRIX-178-179; Pet. App. 71.

IV. The decision of the court of appeals.

On appeal, petitioner contended that the trial court erred in admitting testimony of his pre-arrest pre-*Miranda* silence. Pet. App. 18a. The court of appeals held the Fifth Amendment has no applicability to pre-arrest pre-*Miranda* silence used as substantive evidence in cases in which the defendant does not testify. Pet. App. 22a. The court of appeals found there was no government compulsion in the pre-arrest pre-*Miranda* questioning in which petitioner voluntarily participated for almost an hour. Pet. App. 23a. And, the court of appeals held the Fifth Amendment privilege against self-incrimination was

not triggered and did not prevent the State from offering petitioner's failure to answer the question at issue. Pet. App. 23a.

V. The decision of the Texas Court of Criminal Appeals.

On discretionary review, the Texas Court of Criminal Appeals held that pre-arrest pre-*Miranda* silence is not protected by the Fifth Amendment right against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies. Pet. App. 6a. The Court of Criminal Appeals held the trial court did not err in allowing the State to do just that, and it affirmed petitioner's conviction. Pet. App. 6a. The Court of Criminal Appeals denied petitioner's motion for rehearing. Pet. App. 24a.

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to grant the petition for a writ of certiorari. Evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview did not constitute silence within the purview of the Fifth Amendment privilege against self-incrimination. Petitioner answered the question by his nonverbal conduct and answered all other questions during the nearly hour-long interview. Moreover, petitioner did not invoke the Fifth Amendment privilege against

self-incrimination. And, any error in admitting evidence petitioner "did not answer" the question during a pre-arrest pre-*Miranda* interview was harmless beyond a reasonable doubt.

Near the end of an almost hour-long noncustodial interview, an officer asked petitioner "if the shotgun [officers recovered from petitioner's residence] would match the shells recovered at the scene of the murder?" Record RRV-40, 44. The officer testified, "[h]e did not answer." Record RRV-44. The officer further testified, without objection, that petitioner "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up."[1] Record RRV-44-45.

Petitioner contends the admission of a defendant's pre-arrest pre-*Miranda* silence as substantive evidence of guilt is protected by the Fifth Amendment privilege against compelled self-incrimination and the decision by the Texas Court of Criminal Appeals conflicts with decisions of federal courts of appeals and state courts of last resort. Pet. 2-19.

This case would not be an appropriate vehicle for considering the issue of whether pre-arrest pre-*Miranda* silence is protected by the Fifth Amendment privilege against compelled self-incrimination because, in the context of this case, it is not squarely

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[1] Petitioner does not contest the admission of evidence of his nonverbal conduct in response to the question.

presented. Moreover, petitioner could not benefit from a holding that pre-arrest pre-*Miranda* silence is protected by the Fifth Amendment privilege against compelled self-incrimination.

I. Federal and state courts have reached varying conclusions on the question of whether the admission of pre-arrest pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination.

In *Griffin v. California*, 380 U.S. 609, 615 (1965), this Court held the Fifth Amendment privilege against self-incrimination forbids comment by the prosecution on the defendant's silence or instructions by the court that such silence is evidence of guilt. The Court later explained that *Griffin* held that the defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence at trial against him. *Portuondo v. Agard*, 529 U.S. 61, 67 (2000). In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Court held the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

In *Doyle v. Ohio*, 426 U.S. 610, 611 (1976), the prosecution sought to impeach the defendant's exculpatory story, told for the first time at trial, with

evidence the defendant had remained silent and had failed to provide the same story after receiving *Miranda* warnings following his arrest. While the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. *Id.* at 618. In such circumstances, it would be "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618. The Court held that the use for impeachment purposes of the defendant's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 619.

Yet, in *Jenkins v. Anderson*, 447 U.S. 231, 240-241 (1980), the Court held the admission of a defendant's pre-arrest pre-*Miranda* silence to impeach the defendant's credibility does not violate the Fifth Amendment privilege against self-incrimination or fundamental fairness guaranteed by the Fourteenth Amendment. Then, in *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam), the Court held that in the absence of the sort of affirmative assurances embodied in *Miranda* warnings, permitting cross-examination as to post arrest silence when a defendant chooses to take the stand does not violate due process of law.

This Court's decisions do not address the question of whether the admission of pre-arrest pre-*Miranda* silence as substantive evidence of guilt

violates the Fifth Amendment privilege against self-incrimination. The federal courts of appeals and state courts that have considered such a question have reached varying conclusions. The Fourth, Ninth, and Eleventh Circuits permit the government to use such evidence, reasoning that the protections against self-incrimination do not apply before a suspect has been arrested and has been given *Miranda* warnings. *See United States v. Quinn*, 359 F.3d 666, 678 (4th Cir. 2004); *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998), *overruled on other grounds*, *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010); *United States v. Rivera*, 944 F.2d 1563, 1568 n. 12 (11th Cir. 1991).

The Fifth Circuit, without deciding whether the defendant's pre-arrest silence fell within the reach of "testimonial communications" protected by the Fifth Amendment, has held the prosecutor's use of, and comment upon, the defendant's pre-arrest silence, which was neither induced by nor a response to any action by a government agent, did not violate the Fifth Amendment privilege against self-incrimination. *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996). The arresting customs officer testified that prior to his arrest the defendant said nothing about threats against his daughter or that he was in any kind of trouble or needed any help. *Id.* Then, in closing argument, the prosecutor used this testimony to rebut the duress defense by underscoring that the alleged threats were never reported to the authorities, either here or in Colombia where the

child was located. *Id.* The Fifth Circuit stated the Fifth Amendment privilege against self-incrimination protects against compelled self-incrimination; it does not preclude the proper evidence use and prosecutorial comment about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference. *Id.*

The Fifth Circuit was faced again with the issue of the admission of pre-arrest pre-*Miranda* silence in the government's case-in-chief in *United States v. Ashley*, 664 F.3d 602 (5th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S.Ct. 1651 (2012). A United States Postal Service special agent, during the prosecution's case-in-chief for the theft of mail matter by a postal service employee for stealing gift cards, testified the defendant, before arrest and before *Miranda* warnings, had refused to speak to him during his investigation. *Id.* at 603. The Fifth Circuit, without reaching the issue of whether pre-arrest pre-*Miranda* silence is admissible, held any error was harmless because the evidence shows, beyond a reasonable doubt, that the error did not contribute to the verdict. *Id.* at 605-606.

The First, Sixth, Seventh and Tenth Circuits, however, have held that pre-arrest pre-*Miranda* silence is not admissible as substantive evidence of guilt. *See Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir.), *cert. denied*, 531 U.S. 1035 (2000); *United States v. Burson*, 952 F.2d 1196, 1200-1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir.), *cert. denied*, 493 U.S. 969 (1989); *United States ex rel. Savory v. Lane*, 832

F.2d 1011, 1017-1018 (7th Cir. 1987). And some state courts likewise have held that pre-arrest pre-*Miranda* silence is not admissible as substantive evidence of guilt. *See, e.g.,* Pet. App. 9.

The facts and legal issues in these cases are substantially different. They generally have resulted in different legal reasoning, divergent dicta, and different outcomes based upon the various facts. Many of the cases have involved circumstances in which the defendant affirmatively asserted the privilege against self-incrimination. *See, e.g., Combs v. Coyle*, 205 F.3d 269 ("talk to my lawyer"); *Coppola v. Powell*, 878 F.2d 1562 ("Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy."); *United States ex rel. Savory v. Lane*, 832 F.2d 1011 ("he didn't want to talk about it, he didn't want to make any statements").

Some of the cases have found any federal constitutional error to be harmless. *See, e.g., United States v. Burson*, 952 F.2d 1196; *United States ex rel. Savory v. Lane*, 832 F.2d 1011; *Baumia v. Commonwealth*, ___ S.W.3d ___, 2012 WL 5877581, *7 (Ky. Nov. 21, 2012); *State v. Kulzer*, 979 A.2d 1031 (Vt. 2009). Some of the state courts have relied on state constitutional provisions or evidentiary rules. *See, e.g., State v. Easter*, 922 P.2d 1285 (Wash. 1996) (basing decision on both federal and state constitutions). Relying primarily on *Griffin v. California*, 380 U.S. 609 (1965), and *Doyle v. Ohio*, 426 U.S. 610 (1976), these

cases have extended such decisions far beyond their stated holdings and are not faithful to the text and history of the Fifth Amendment privilege against self-incrimination.

II. Pre-arrest pre-*Miranda* silence is not protected by the Fifth Amendment privilege against self-incrimination and the decision by the Texas Court of Criminal Appeals is correct.

The decision by the Court of Criminal Appeals holding that pre-arrest pre-*Miranda* silence is not protected by the Fifth Amendment privilege against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies, is correct. The Fifth Amendment privilege against self-incrimination is not applicable to pre-arrest pre-*Miranda* silence because there is no official compulsion to speak.

The Fifth Amendment privilege against compulsory self-incrimination is not implicated by the admission of pre-arrest pre-*Miranda* silence as substantive evidence of guilt. To hold otherwise would be directly contrary to the text of the Fifth Amendment, which states, "[n]o person . . . shall be *compelled* in any criminal case to be a witness against himself." U.S. CONST. amend. V (emphasis added). Justice Stevens, in his concurring opinion, joined by Justice Stewart, rejected the argument that the Fifth Amendment was implicated by the admission of

evidence of pre-arrest silence. *Jenkins v. Anderson*, 447 U.S. at 241 (Stevens, J., concurring).

The Fifth Amendment privilege against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak. *Jenkins v. Anderson*, 447 U.S. at 241 (Stevens, J., concurring). The policies underlying the privilege against compulsory self-incrimination have no application in a pre-arrest context. *Id.* at 243. When a citizen is under no official compulsion whatsoever, either to speak or to remain silent, there is no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. *Id.* at 243-244. For in determining whether the privilege is applicable, the question is whether the accused was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. *Id.* at 244. A different view ignores the clear words of the Fifth Amendment. *Id.*

Holding the admission of pre-arrest pre-*Miranda* silence as substantive evidence of guilt to be a violation of the Fifth Amendment privilege against self-incrimination cannot be reconciled with this Court's decision in *Miranda* and its progeny. This Court held the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. at 444. Prior to any questioning, the person must be warned that he has a right to

remain silent, that anything said can and will be used against him in court, that he has a right to consult with a lawyer and to have the lawyer with him during the interrogation, and that if he is indigent a lawyer will be appointed to represent him. *Id.* at 444 & 469-473. *Miranda* applies only to statements stemming from custodial interrogation. *Id.* at 444. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* at 444.

In *Beckwith v. United States*, 425 U.S. 341, 347 (1976), the Court rejected the argument that *Miranda* should be extended to cover interrogation in noncustodial circumstances after a police investigation has focused on the suspect. The Court stated that *Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar "nature and setting of . . . in-custody interrogation." *Id.* at 346. "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the Miranda requirements with regard to custodial questioning." *Id.* at 346-347, quoting *United States v. Caiello*, 420 F.2d 471, 473 (2nd Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

This Court long ago upheld the admission of evidence of pre-arrest flight as substantive evidence.

See Alberty v. United States, 162 U.S. 499 (1896). And, the Court also has upheld the admission of evidence of pre-arrest pre-*Miranda* statements. *See, e.g., Beckwith v. United States*, 425 U.S. 341 (1976) (holding taxpayer's pre-arrest pre-*Miranda* statement to IRS special agent during interview in private home admissible even though taxpayer may have been focus of investigation); *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984) (holding motorist's pre-arrest pre-*Miranda* roadside statements admissible).

"If a defendant's pre-arrest and pre-*Miranda confession* is admissible in the government's case-in-chief, how can a defendant's pre-arrest and pre-*Miranda silence* be barred?" Michael J. Hunter, *The Man on the Stairs Who Wasn't There: What Does a Defendant's Pre-Arrest Silence Have to Do with Miranda, the Fifth Amendment, or Due Process?*, 28 Hamline L. Rev. 277, 295 (2005). Or, as raised by this well-reasoned article: Why would a defendant's silence, or his refusal to answer questions, be afforded more constitutional protection than a defendant's statement, which generally constitutes far more expressive conduct? *See* 28 Hamline L. Rev., at 295 & 298 (2005).

III. Evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview did not constitute silence within the purview of the Fifth Amendment privilege against self-incrimination where petitioner answered the question by his nonverbal conduct and answered all other questions during the voluntary noncustodial interview.

Even if pre-arrest pre-*Miranda* silence is protected by the Fifth Amendment privilege against self-incrimination, evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview did not constitute silence within the purview of the Fifth Amendment privilege against self-incrimination and the Fifth Amendment therefore was not implicated.

Petitioner voluntarily went to the police station and gave an exculpatory statement to officers conducting an investigation into the murders of Juan and Hector. Record RRV-39-40. An officer asked petitioner "if the shotgun [officers recovered from petitioner's residence] would match the shells recovered at the scene of the murder?" Record RRV-40, 44. While the officer testified petitioner did not answer, he also testified petitioner looked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, and began to tighten up. Record RRV-44-45. And, petitioner answered all other questions during the 58 minute interview. Record RRV-47. Because petitioner was not silent, this case does not

present a situation where silence was used against a defendant.

IV. Petitioner did not invoke the Fifth Amendment privilege against self-incrimination.

Even if pre-arrest pre-*Miranda* silence is protected by the Fifth Amendment privilege against self-incrimination, petitioner did not invoke the Fifth Amendment privilege against compelled self-incrimination. The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel. *Berghuis v. Thompkins*, ___ U.S. ___, 130 S.Ct. 2250, 2261 (2010). Both the *Miranda* right to counsel and the *Miranda* right to remain silent protect the privilege against compulsory self-incrimination by requiring interrogation to cease when either right is invoked. *Id.* at 2254.

Petitioner, like Thompkins, did not say that he wanted to remain silent or that he did not want to talk with the police. Record RRV-44-45; *Berghuis v. Thompkins*, 130 S.Ct. 2250. Had he made either of these simple, unambiguous statements, he would have invoked the "right to cut off questioning." *Berghuis v. Thompkins*, 130 S.Ct. 2250.

V. Any error in the admission of evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview was harmless beyond a reasonable doubt.

Even if the admission of evidence that petitioner "did not answer" one specific question during a pre-arrest pre-*Miranda* interview violated the Fifth Amendment privilege against compelled self-incrimination, any error in the admission of such evidence was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967). Petitioner cannot show he suffered harm. Petitioner answered the question by his nonverbal conduct when he looked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, and began to tighten up. Record RRV-44-45.

Moreover, there was overwhelming evidence of petitioner's guilt. John Damien Cuellar, petitioner's good friend, testified petitioner kept a shotgun in the rear of his Camaro, and petitioner admitted that he had returned to the apartment in a Camaro and he, alone, had killed Juan and Hector. Record RRIV-168, 171, 179, 180-181, 183-185, 189, 191, 224-225. Shortly thereafter, Damien told petitioner he had decided to tell the police what petitioner had told him, and that petitioner has to do what he has to do, whether it is turning himself in or running. Record RRIV-190-191. Petitioner absconded and officers spent years searching for him. Record RRV-59-63. Finally, in 2007, officers located petitioner in custody, after he had

been arrested under a different name and a different date of birth. Record RRV-63-65.

The shotgun shells recovered at the scene of the murders had been fired in the shotgun recovered from petitioner's residence. Record RRIV-84, 92, 96, 103-104; RRV-10, 12, 36, 49-50, 149, 181-182, 201, 203. The description of the vehicle observed at the scene of the murders matched vehicles owned by petitioner and his family. Record RRIV-73, 146-147; RRV-19, 22, 29. The description of only one man being observed running from the scene of the murders matched petitioner's admission to Damien that he, alone, had killed Juan and Hector. Record RRIV-73, 140, 142. 144.

Clearly, the record as a whole establishes beyond a reasonable doubt that no harm occurred from the admission of evidence petitioner "did not answer" one question.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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REPLY BRIEF

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No. 12-246

IN THE

Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari
to the Texas Court of Criminal Appeals

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REPLY BRIEF FOR PETITIONER

The State does not dispute that the question whether the Fifth Amendment precludes the prosecution from introducing pre-arrest, pre-*Miranda* silence in its case-in-chief is an extremely important and frequently recurring one. And the State acknowledges that federal courts of appeals and state courts of last resort are deeply divided over the issue. BIO 10-11. Indeed, the conflict has grown even deeper since the petition was filed; last month, the Kentucky Supreme Court joined those courts holding that the Fifth Amendment prohibits the prosecution from using a defendant's silence during pre-arrest questioning as substantive evidence of guilt. *Baumia v. Commonwealth*, ___ S.W.3d ___, 2012 WL 5877581, at *2-5 (Ky. Nov. 21, 2012).

The State nevertheless asks this Court to deny certiorari for two reasons. First, the State argues that the Texas Court of Criminal Appeals' decision is correct on the merits. Second, the State asserts that this case is an unsuitable vehicle for resolving the conflict at issue.

Neither of the State's arguments is persuasive. The State's argument on the merits provides no reason to deny review in a case involving a deep and mature conflict – and is unconvincing even on its own terms. The State's vehicle arguments – which, for the most part, depend on contentions it has never before advanced in this case – are specious. This Court should grant certiorari and bring much-needed clarity to this critical area of law.

1. The State's defense of the Texas Court of Criminal Appeals' holding does little more than echo that court's reasoning. Specifically, the State

contends that the prosecution may use a defendant's refusal to answer pre-arrest questions from law enforcement against him because a person cannot face any "official compulsion to speak" before he is taken into custody. BIO 12. In advancing that argument, the State focuses entirely on the kind of physical and psychological compulsion that prompted this Court, in *Miranda v. Arizona*, 384 U.S. 436 (1966), to require warnings before police conduct custodial interrogations. BIO 13.

But as petitioner has already explained (Pet. 14-17), the physical and psychological coercion present during custody is not the only form of compulsion that the Fifth Amendment recognizes. In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that a person is compelled to be a witness against himself if the prosecution is allowed to use his silence at trial as substantive evidence against him. *Id.* at 614; *see also Lakeside v. Oregon*, 435 U.S. 333, 339 (1978) ("[U]nconstitutional compulsion [i]s inherent in a trial where prosecutor and judge [are] free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand."). This form of compulsion has nothing to do with physical or psychological coercion during custody. Many nontestifying defendants are not in custody at the time of trial. And in *Miranda* itself, this Court made clear that even after officers have given the required warnings to suspects in custody – that is, even after the potential for physical and psychological coercion has been dispelled – "[t]he prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n.37 (citing *Griffin*); *see also* NACDL Amicus Br. 4-7 (elaborating on this form of

compulsion and explaining why it is present in this case).

The State offers no reason why *Griffin*-style compulsion is not present here. Instead, the State argues that Justice Stevens' concurrence in *Jenkins v. Anderson*, 447 U.S. 231 (1980), "rejected the argument that the Fifth Amendment was implicated by the admission of pre-arrest silence." BIO 12-13. But Justice Stevens limited his observation to a person's silence "before he has any contact with the police." *Jenkins*, 447 U.S. at 243; *see also* Pet. 19. Once the police begin questioning someone, the Fifth Amendment's central aim of avoiding an inquisitorial system is squarely implicated. *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 60 (1968) (Fifth Amendment applies to governmental request to provide information in noncustodial setting); *Malloy v. Hogan*, 378 U.S. 1, 3, 14 (1964) (same); *Watkins v. United States*, 354 U.S. 178, 188, 196 (1957) (same).

Finally, the State argues that it would make no sense to allow the prosecution to introduce a defendant's pre-arrest *statements* in its case-in-chief but to preclude introduction of his *silence*. BIO 14-15. But in fact it makes eminent sense. When a person voluntarily responds to law enforcement questioning, he relinquishes his Fifth Amendment right to remain silent. *See, e.g.*, *Jenkins*, 447 U.S. at 238; *Raffel v. United States*, 271 U.S. 494, 498 (1926). By contrast, when a person declines to speak, he exercises his right to remain silent and maintains his ability to invoke it at trial. *See, e.g.*, *Marchetti*, 390 U.S. at 50-51.

2. None of the State's three vehicle arguments withstands scrutiny.

a. At trial, one of the officers who interviewed petitioner explained that petitioner "did not answer" his question whether the shells found at the victims' apartment would match the shotgun petitioner had given the officers. Pet. App. 11a. At closing, the prosecution stressed three times that petitioner "wouldn't answer that question." *Id.* 18a-19a. And on appeal, the State maintained that it was permissible to use petitioner's "silence" as substantive evidence of guilt. State's Br. in Tex. Ct. Crim. App. 3, *available at* 2012 WL 244956. The Texas Court of Appeals and Court of Criminal Appeals agreed, holding that the Fifth Amendment permitted the State to rely and comment on petitioner's "failure to answer the question" and his "silence." Pet. App. 6a, 23a.

The State now asserts for the first time that "petitioner was not silent" after all. BIO 16. Specifically, the State contends that "petitioner answered the question" about the shotgun shells "by his nonverbal conduct." *Id.*

This is nonsense. While some nonverbal conduct, such as a shake of the head, can answer an inquiry, *see, e.g.*, *Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966), the State cites no authority for its suggestion that the mere manner in which someone remains silent can be so communicative as to somehow answer a question. Nor does any such authority exist. Courts unanimously have held – consistent with common sense – that simply describing "what a defendant looked like in remaining silent" is "tantamount to [introducing]

evidence of silence." *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028, 1032 (9th Cir. 2001); *accord United States v. Elkins*, 774 F.2d 530, 537 (1st Cir. 1985); *State v. Easter*, 922 P.2d 1285, 1287, 1292 (Wash. 1996). This is especially so when, as here, the State contended at trial that the defendant "wouldn't answer th[e] question" at issue. Pet. App. 18a-19a. The State thus cannot evade the constitutional question raised by its use of petitioner's silence by a "post-hoc [re]characterization" of its evidence and arguments. *Velarde-Gomez*, 269 F.3d at 1032.

b. The State next argues that petitioner cannot rely now on the Fifth Amendment because he "did not invoke" the privilege during his interview. BIO 17. But this argument confuses cases involving the admissibility of pre-trial *statements* with those involving pre-trial *silence*. When a defendant argues that pre-trial *statements* he made should be excluded because they were obtained in violation of the Fifth Amendment, he must show that he actually invoked his right to remain silent before making the statements, thus rendering the statements effectively involuntary. *See, e.g.*, *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260-61 (2010); *United States v. Kordel*, 397 U.S. 1, 7-10 (1970).

But petitioner does not seek to exclude any statements he made. Instead, he contends that the prosecution violated the Fifth Amendment by relying and commenting at trial on his *silence*. No previous formal invocation is necessary to make such an argument, for pre-trial silence constitutes an expression of the privilege, not an arguable waiver of it. *See Marchetti*, 390 U.S. at 50-51. Accordingly, this Court has made clear that a person who "*stood*

mute or claimed his privilege in the face of accusation" during a pre-trial but post-arrest interview may rely on *Griffin* to preclude the prosecution from using that silence against him at trial. *Miranda*, 384 U.S. at 468 n.37 (emphasis added).

Lower courts have reached the same conclusion with respect to pre-arrest interviews. *See United States v. Burson*, 952 F.2d 1196, 1200 (10th Cir. 1991) (it sufficed for *Griffin* claim that defendant's "silence was exhibited" during the pre-custodial interview); *Baumia*, ___ S.W.3d ___, 2012 WL 5877581, at *5 n.10 ("[T]here is no difference [under *Griffin*] between the introduction of a criminal defendant's invocation of her right to remain silent and her silence itself."); *Easter*, 922 P.2d at 1287; *State v. Rowland*, 452 N.W.2d 758, 761 (Neb. 1990). The State cites no authority to the contrary, and no basis for any exists.

c. The State never argued in the Texas Court of Appeals or the Court of Criminal Appeals that any Fifth Amendment error here could be harmless. Nor did either appellate court below suggest such a possibility. The State now contends, however, that any erroneous reliance on petitioner's silence was harmless because "there was overwhelming evidence of petitioner's guilt." BIO 18. This contention is hard to take seriously. The State's star witness initially failed to implicate petitioner in the killings. He changed his story and claimed that petitioner confessed to him only "after a dream" in which he was supposedly visited by the victims. Pet. App. 13a. And petitioner vigorously challenged the only physical evidence that arguably supported this

dream-induced testimony – the State's ballistics report. Pet. 4.

But this Court need not make guesses about the strength of the State's case. The State presented all of the same evidence it references now – with the sole exception of any significant reliance on petitioner's silence during his pre-arrest interview – at an initial trial, and the jury hung. *See* Pet. 2-3. Only after the State, at the second trial, made a passionate argument based on petitioner's pre-arrest silence – arguing that an "innocent person" would have answered the officer's question – did it obtain a conviction. *Id.* at 4-5, 14; Pet App. 18a-19a. When the sole difference between a trial that proved inconclusive and one in which the prosecution obtained a conviction is the evidence at issue, it almost automatically follows that the improper admission of that evidence could not have been harmless. *See, e.g.*, *Zappulla v. New York*, 391 F.3d 462, 472-73 (2d Cir. 2004); *Moreno v. Borg*, 1990 WL 212649, at *3 (9th Cir. 1990); *Brown v. Dugger*, 831 F.2d 1547, 1558 (11th Cir. 1987) (Clark, J., concurring).

Consequently, far from constituting a deficient vehicle, this case frames the question presented in stark relief. This case accordingly presents the perfect opportunity to resolve the split of authority over the issue. This Court should do so now and deliver the certainty that both the prosecution and criminal defense communities have told this Court that they want and need. *See* Pet. 11-12 (discussing previous amicus brief from a group of states); NACDL Amicus Br. 3-4.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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December 19, 2012

AMICUS CURIAE BRIEF

No. 12-246

IN THE
Supreme Court of the United States

GENOVOVO SALINAS,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

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QUESTION PRESENTED

Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.

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IN THE

Supreme Court of the United States

No. 12-246

GENOVOVO SALINAS,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 40,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2.

defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights.

INTRODUCTION

Amicus agrees with Petitioner that a writ of certiorari should be granted in this case. Amicus submits this brief to elaborate on the reasons why, in its view, the conflict among the circuits and state courts on when the Fifth Amendment protects a defendant's refusal to answer law enforcement questioning is an important issue that merits resolution by this Court.

It often is in the best interest of a suspect questioned by law enforcement to decline to answer questions. Justice Jackson put it more strongly: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). Every day, NACDL lawyers advise countless clients—rich or poor, innocent or guilty—not to make statements to law enforcement. This simple advice helps to protect a suspect's constitutional rights under the Fifth and Sixth Amendments and puts the burden on the

Government to establish any guilt beyond a reasonable doubt at trial.

Yet the Fourth, Eighth, and Eleventh Circuits, along with the States of Minnesota, Missouri, and Texas, have held that a defendant's pre-arrest silence may be commented on by prosecutors and used as evidence of guilt at trial. Pet. at 9–10. It is common ground that silence after arrest is protected, and prosecutors cannot argue at trial that an innocent man would have talked to the police after he was arrested.[2] These courts hold, however, that any right to remain silent attaches only after arrest and that a suspect's silence before he is in custody can be converted at trial into an implied admission of guilt.

This is entirely inconsistent with fundamental constitutional interests. The Fifth Amendment protects against compulsion to be a witness against oneself, but the decision below approves exactly such compulsion. There is nothing voluntary about a decision to answer police questions when a failure to answer can be evidence of guilt at trial. In short, the decision below is intolerable and should not be allowed to stand.

Of particular concern to NACDL, the lack of uniformity among the circuits and the states on this issue leads to deep uncertainty as lawyers consider

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[2] *See, e.g.*, Pet. at 5 (describing the prosecutor's closing argument telling the jurors what "[a]n innocent person is going to say" to law enforcement rather than refusing to answer).

whether it is truly best to advise their clients to make no statement to police. This Court's review is necessary both to clarify the law and to uphold the longstanding principles of the Fifth Amendment privilege against self-incrimination.

ARGUMENT

I. IF PROSECUTORS CAN USE PRE-ARREST SILENCE AS EVIDENCE OF GUILT, SUSPECTS QUESTIONED BY POLICE ARE SUBJECT TO A "CRUEL TRILEMMA."

The Court has previously described the injustice of using a suspect's post-arrest silence against him, in a narrative that applies with equal force to pre-arrest silence. *Miranda v. Arizona*, 384 U.S. 436, 454 (1966). Consider this scenario, adapted to the pre-arrest context:

A crime has been committed, and the police think they know who might have done it. They have some evidence but know that a confession would seal their case. So the officers go to the suspect's home, ask to speak with him, and confront him with difficult questions. He is not under arrest. The suspect, however, refuses to answer the questions, perhaps even asserting a right to remain silent or saying that he wants to speak with his lawyer.

The officer, however, then "point[s] out the incriminating significance of the suspect's refusal to talk:

> 'Joe, you have a right to remain silent. That's your privilege and I'm the last

> person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over.'"

Miranda, 384 U.S. at 454 (quoting Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (1962), a manual for police interrogators). As this Court found, "[f]ew will persist in their initial refusal to talk . . . if this monologue is employed correctly." *Id.*

The rationale of the decision below would allow for an even higher level of coercion. Suppose the officer continues, "Joe, you don't have to answer my questions, but if you don't, then that's going to be used as evidence that you're guilty. The prosecutor is going to stand in front of that jury and tell them that an innocent man would answer my questions. So you don't need to talk to your lawyer, you need to answer my questions right now."

Many would find this police conduct shocking and abusive. But the officer in this example is doing nothing more than correctly stating the law of the three circuits and three states which hold that there

is no Fifth Amendment right to remain silent prior to arrest and that prosecutors can use a suspect's silence as substantive evidence of guilt at trial.

Under this regime, the suspect finds himself in an impossible situation. He can answer the police questions truthfully, possibly incriminating himself in this or other crimes. He can lie to law enforcement, itself often a crime.[3] Or he can remain silent and risk that his silence will be used against him as evidence of his guilt.

The suspect's predicament is a variant of the "cruel trilemma" described in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964). The classic "trilemma" prohibited by the Fifth Amendment is of "self-accusation, perjury or contempt." *Id.* "[A] suspect is 'compelled . . . to be a witness against himself' at least whenever he must face the modern-day analog of the historic trilemma." *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (ellipsis in original) (citation omitted). Such analogs apply whenever there is a compulsion to answer, such as in custodial interrogations, *id.* at 596 n.10, or when there is any threat of a penalty for silence, such as a forfeiture of goods, *Boyd v. United States*, 116 U.S. 616, 634 (1886), losing one's government job, *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967),[4] disbarment, *Spevack v. Klein*, 385

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[3] *See* 18 U.S.C. § 1001.

[4] *Garrity* addressed an inquiry and investigation by the New Jersey Attorney General for a report to the court. 385 U.S. 493, 494 (1967). The questioning in that case was not post-arrest or

U.S. 511, 515–16 (1967), or a loss of government contracts, *Lefkowitz v. Turley*, 414 U.S. 70, 83–85 (1973).

What matters for these cases is not the time when the privilege is asserted, but rather whether an individual "was deprived of his free choice to admit, to deny, or to refuse to answer" by the penalty imposed by the Government. *Garrity*, 385 U.S. at 496. For if the Government imposes a penalty upon an individual's silence, then no "free choice" exists and the suspect is compelled, in violation of the Fifth Amendment, to be a witness against himself. *Id.*

Under the regime imposed by the Texas courts below, a suspect undergoing police questioning faces the same compulsion through a cruel trilemma of self-incrimination, lying to police, or an implied admission of guilt. "Any time an individual is questioned by the police, that individual is compelled to do one of two things—either speak or remain silent. If both a person's prearrest speech and silence may be used against that person . . . [he] has no choice that will prevent self-incrimination." *See Wisconsin v. Fencl*, 325 N.W.2d 703, 711 (Wis. 1982)).

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before a court or legislative committee, and thus was similar to pre-arrest investigatory questioning by police.

II. THE COURT SHOULD CLARIFY THIS ISSUE, AS THE CURRENT UNCERTAINTY HAS SERIOUS CONSEQUENCES FOR PERSONS QUESTIONED BY LAW ENFORCEMENT.

A. Police Can Manipulate Suspects into Incriminating Themselves Through Silence.

Allowing pre-arrest silence to be used as evidence of guilt encourages police officers to generate additional incriminating evidence—entirely lawfully, according to the Texas court—by questioning the defendant and inducing a refusal to speak. Courts have recognized that because police determine the timing of arrest, a holding that the Fifth Amendment does not apply pre-arrest "would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant's pre-arrest silence as evidence of guilt." *Washington v. Easter*, 922 P.2d 1285, 1290 (Wash. 1996) (en banc); *see also Ohio v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004) (finding that it "would encourage improper police tactics, as officers would have reason to delay administering *Miranda* warnings so that they might use the defendant's pre-arrest silence to encourage the jury to infer guilt").

Condoning self-incrimination by pre-arrest silence would also incentivize police to employ other strategies to elicit a refusal to answer, rather than a truthful answer, from a suspect. For example, officers may ask questions in a hostile or discomfiting manner in the hope that the suspect

will refuse to answer. Or they can adopt a strategy of surprise. In this case, officers interviewed Petitioner for an hour about other individuals at the party and their motivations before turning the investigation squarely onto Petitioner by asking whether the shotgun from his home would match the shells found at the murder scene. Pet. at 3. Petitioner was silent, and the prosecutor used this to argue that an "innocent person is going to say" something rather than be silent. Pet. at 5. Just as there are psychological tactics for police to try to get confessions, *see Miranda*, 384 U.S. at 448–54, there are likewise tactics which can be employed to get suspects to refuse to answer.

B. Self-Incrimination by Pre-Arrest Silence Disadvantages Citizens for Relying on a Right To Remain Silent.

Allowing the government to introduce evidence of pre-arrest silence is a trap for the innocent and unwary. Virtually all citizens now recognize a right to remain silent and may unwittingly provide police with substantive evidence of their guilt simply by refusing to talk.

The "Right to Remain Silent" is so well known to members of the public that it is "implausible" "[i]n the modern age of frequently dramatized 'Miranda' warnings" that a "person under investigation may be unaware of his right to remain silent." *Brogan v. United States*, 522 U.S. 398, 405 (1998); *see also Leach*, 807 N.E.2d at 342 ("With the proliferation of movies and television shows portraying the criminal justice system, it would be difficult to find a person

living in America who has not heard of *Miranda* warnings."). Individuals who believe they have a "right to remain silent" may not understand that—at least in some jurisdictions—no such right exists prior to arrest, and so may unwittingly provide police and prosecutors with an implied admission of guilt. *See Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000) (finding that one of the reasons a defendant may remain silent before arrest is "knowledge of his *Miranda* rights").

Innocent persons may decline to speak to law enforcement (or wish to speak to their lawyers first) for a variety of legitimate, innocent reasons, including: "fear of police, threats from another person not to speak with police, embarrassment about a relationship or course of conduct that is not necessarily criminal, or the belief that explaining his or her conduct is futile." *Leach*, 807 N.E.2d at 342. Yet prosecutors sometimes try to use a defendant's refusal to confess, *see Coppola v. Powell*, 878 F.2d 1562, 1564 (1st Cir. 1989), or his request to talk to a lawyer, *see Combs*, 205 F.3d at 279; *see also Leach*, 807 N.E.2d at 339; *Fencl*, 325 N.W.2d at 710, as substantive evidence of guilt. Absent this Court's review, courts in many jurisdictions will allow such evidence and argument, and the "right to remain silent" will be illusory.

C. Allowing Prosecutors To Use Pre-Arrest Silence Chills Exercise of Fifth Amendment Rights at Trial.

When a prosecutor uses pre-arrest silence as evidence of guilt, there is little the defendant can do

to respond. There is no alibi witness or physical evidence that the defendant can offer to answer such attacks. The defendant has only two options. He can allow the attack and hope that the jury won't judge him too harshly for not speaking to the police. Or, he can waive his Fifth Amendment right and testify in his own defense, trying to explain the reason why he chose not to speak to the police in the first place. *See Leach*, 807 N.E.2d at 341 ("Use of pre-arrest silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior silence.").

Only the defendant himself can answer the question of why he did not talk to police in the first instance. It may be for any of the entirely legitimate and innocent reasons discussed above, but in order to explain that, the defendant must waive all of the Fifth Amendment's protections and expose himself to questioning not just on his refusal to answer, but also to the substance of the alleged crime itself, as well as any prior convictions or criminal conduct that may be admissible under the Rules of Evidence. In the words of the Sixth Circuit, the defendant is "under substantial pressure to waive the privilege against self-incrimination . . . at trial in order to explain the prior silence." *Combs*, 205 F.3d at 285.

Allowing use of pre-arrest silence thus shifts the burden in the Government's favor. It "actually lessens the prosecution's burden of proving each element of the crime," *id.* at 285, and hollows the promise of the Self-Incrimination Clause. *See*

Slochower v. Board of Higher Educ., 350 U.S. 551, 557–58 (1956) ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent . . . to a confession of guilt . . . .").

D. Use of Pre-Arrest Silence Unfairly Skews the Balance Between Prosecution and Individuals.

A prosecutor's need for evidence is reduced if she can argue that the defendant would have come clean to the police if he were innocent. This kind of evidence "substantially impairs the sense of fair play," *Combs*, 205 F.3d at 285, which requires that the Government "shoulder the entire load" in order to maintain a "fair state-individual balance." *Miranda*, 384 U.S. at 460; *Murphy*, 378 U.S. at 55.

It is an unfortunate fact that many residents of the highest crime neighborhoods—often minorities and many of our most impoverished citizens—have deep suspicions of the police. *See, e.g.*, Robert J. Sampson & Dawn J. Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 Law & Soc'y Rev. 777 (1998); *see also United States v. Giraldo*, 743 F. Supp. 152, 154 (E.D.N.Y. 1990) (taking "judicial notice of the suspicion with which the police . . . are regarded in many poor urban communities."). There is little desire in these communities to cooperate with police or to answer their questions. Such apprehension may have very little to do with whether an individual is guilty of any crime, and far more to do with community fear

or distrust of the police. Allowing prosecutors to use a refusal to cooperate as an implied admission of guilt may well have the most severe impact on defendants in these communities.

But one should not discount the impact of a regime of pre-arrest self-incrimination in "white collar" criminal cases. Suspects in such cases—often sophisticated businesspersons—commonly refuse to speak to law enforcement without a lawyer present. Such a refusal or "lawyering up" can be evidence of consciousness of guilt under the reasoning of the Texas court below. Additionally, white-collar investigations often take months or years without any arrest or indictment. During that time, prosecutors and police frequently request to interview persons of interest in the investigation, and those persons—often on advice of counsel—routinely decline to be interviewed or insist on immunity. Allowing pre-arrest self-incrimination by silence turns this system upside down. An attorney's proper advice to his client to decline to meet with prosecutors could boomerang into evidence of the client's consciousness of guilt.

Finally, and perhaps most importantly for the majority of criminal defendants, pre-arrest silence as evidence of guilt gives prosecutors significantly greater leverage in plea bargaining. Roughly 90% of criminal cases end with a defendant's plea.[5] For

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[5] *See* George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 223 (Stanford Univ. Press 2003); *see also Sourcebook of Criminal Justice Statistics Online*, Table 5.22.2010, available at http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last

cases where prosecutors would otherwise have a weak case, and where criminal defendants would be willing to risk a jury trial, prosecutors have a powerful tool to convince defendants to accept a plea bargain. The simple fact that a defendant did not answer police questions can be evidence that may persuade many defendants to plead guilty—and many lawyers to advise such a plea—for reasons that may have nothing to do with their innocence or guilt.

This Court should reject such a penalty for silence, and reject any pre-arrest compulsion of defendants to choose between self-incrimination through speech and self-incrimination through silence. Such a choice is antithetical to the policies and principles underlying the Fifth Amendment, and has no place in our accusatorial system of justice which puts the full burden on the Government of establishing beyond a reasonable doubt that the defendant has committed a crime.

CONCLUSION

For the foregoing reasons, amicus curiae National Association of Criminal Defense Lawyers supports Petitioner Salinas's petition for certiorari, and respectfully requests that the petition be granted.

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visited Sept. 25, 2012) (showing that in 2010, 88.9% of all criminal defendants in federal court were convicted by a plea of guilty or *nolo contendere*).

Respectfully submitted,

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September 26, 2012

JOINT APPENDIX

Supreme Court, U.S.
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No. 12-246

IN THE
Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

TEXAS,

Respondent.

On a Writ of Certiorari
to the Texas Court of Criminal Appeals

JOINT APPENDIX

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Certiorari granted January 11, 2013

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06/24/2008	State of Texas, Harris County District Court. First Trial Commences.
06/27/2008	State of Texas, Harris County District Court. First Trial Concludes, Mistrial Order Entered.
03/11/2009	State of Texas, Harris County District Court. Second Trial Commences.
03/17/2009	State of Texas, Harris County District Court. Second Trial Concludes, Sentence Imposed.
04/16/2009	State of Texas, Harris County District Court. Notice of Appeal Filed.
03/17/2011	Court of Appeals of Texas, 14th District. Decision Issued.
09/14/2011	Court of Criminal Appeals of Texas. Discretionary Review Granted.
04/25/2012	Court of Criminal Appeals of Texas. Decision Issued.
06/06/2012	Court of Criminal Appeals of Texas. Motion for Rehearing Denied.

REPORTER'S RECORD

VOLUME 4 OF 10 VOLUMES

TRIAL COURT CAUSE NO. 656545

GENOVEVO SALINAS Appellant	IN THE DISTRICT COURT
vs.	HARRIS COUNTY, TEXAS
THE STATE OF TEXAS Appellee	230th JUDICIAL DISTRICT

****

GUILT-INNOCENCE PROCEEDINGS

****

On the 11th day of March, 2009, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Belinda Hill, Judge presiding, held in Houston, Harris County, Texas;

Proceedings reported by computer-aided transcription/stenograph shorthand.

[2] APPEARANCES

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* * * *

[14:6]

MR. WEISSFISCH: Judge, we have one more thing on that other motion. They had mentioned yesterday about particular statements that the defendant had made or lack of and this is a statement where he was taken into where he was taken down to the station and they are talking to him and asking him questions. He is answering all the questions and they asked hey, is your gun going to match the bullets we found at the scene and then he quits. He won't answer that question. He talks about some of the questions and yesterday Mr. McWilliams had said that the State agreed in the last trial not to bring that up. That's not like yesterday factually wrong. In fact last trial they did bring it up. They weren't into all the testimony about whether or not it was in custody statement and they in fact introduced that evidence, so, I have looked at the testimony now of both in the transcript of last trial and everything that's in the offense report and it's clear that what occurred was they were speaking with the defendant at his house. They asked him voluntarily come down to the [15] station to take photographs and to clear him as suspect and then when they get down there they talk with him and he is free to go and not under arrest, not handcuffed and they go through all that cross-examination and direct and redirect and they talk to him and then they do bring out the fact that you know answers, questions in certain things, then refuses to answer that question. And it's later that they run his history, finds out that he has warrants and holds him on those warrants

those warrants when you were out at his house. He was a dangerous guy. They said he was in a hurry. He was not in custody at the time he made those statements and therefore it's admissible. Because of that, I'd like to also talk about in my opening statement because it's very important piece of evidence it goes along with the evidence that's presented to the jury.

MR. McWILLIAMS: That is incorrect. There was an agreement.

THE COURT: How can the two of you read the same transcript and accuse the other of being wrong of that.

MR. McWILLIAMS: If you look at that what happened was Mr. Petroff made the arguments part of my cross-examination that I had open the door to that. [16] There was – we went back and fought about it and the judge ultimately let it come in, but I got Mr. Petroff phone him, I think if you talk to him he will agree that was something we discussed beforehand and outside of me having open the door to it and that is the argument they made at the time and actually is probably correct, but essentially I don't open the door.

MR. WEISSFISCH: Judge, in the transcript he says I didn't agree to that, but at any rate it doesn't matter because it's not relevancy issue, no need to open the door. The only question whether or not in custody statement or not and when that can come in and I don't think that we need to open the door. It's relevant information that we want to prove our case and I think they already sort of have had a hearing? He isn't with Sergeant Elliott and with the defense cross-examine to show that is not in custody statement and therefore we should be allowed to get into it and be able to talk about it in opening statement.

MR. McWILLIAMS: He can invoke his Fifth Amendment to remain silent on any question. And you can't. I think it is punishing him for certain Fifth

Amendment rights to say you know I am not going to answer that.

THE COURT: Well, I agree with the State. I [17] think the issue is whether or not he was in custody when he made the statement or not and while I understand it was litigated since I didn't hear the testimony to make that determination, whether I think he was in custody or not. I'm not comfortable with ruling on that at this point until I hear the testimony.

MR. WEISSFISCH: Okay.

* * * *

REPORTER'S RECORD

VOLUME 5 OF 10 VOLUMES

TRIAL COURT CAUSE NO. 656545

GENOVEVO SALINAS Appellant	IN THE DISTRICT COURT
vs.	HARRIS COUNTY, TEXAS
THE STATE OF TEXAS Appellee	230th JUDICIAL DISTRICT

****

GUILT-INNOCENCE PROCEEDINGS

****

On the 12th day of March, 2009, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Belinda Hill, Judge presiding, held in Houston, Harris County, Texas;

Proceedings reported by computer-aided transcription/stenograph shorthand.

* * * *

[REDIRECT EXAMINATION OF SERGEANT C.E. ELLIOTT BY MS. GARCIA] [28:2]

MS. GARCIA: May I publish this [sic] the jury, Your Honor?

THE COURT: Yes, ma'am.

(Exhibit published)

Q. (By Ms. Garcia) So, when you went to – you were at the defendant's house before we offered this picture. And that was the first time you had met Genovevo Salinas; is that correct?

A. Correct.

Q. And who was present when you arrived? Who were you with?

A. At Geno's house?

Q. Yes.

A. Sergeant Wendel and myself.

Q. And who was there with you? I'm sorry. Who was present at the house? I'm sorry.

A. Geno and his father.

Q. And what is father's name?

A. Let me get – I want to make sure I pronounce it right. Genevevo Preneda.

Q. And did you ever learn the middle name for this defendant?

A. I have learned it. It was also hard to – [29] Genevevo Salinas Salinas.

Q. So, they have the same name but different middle names?

A. Correct.

Q. Were there any cars at the house on that day?

A. Yes.

Q. Can you tell us what they were?

A. Trans Am.

Q. And what colors were they?

A. Red and dark blue.

Q. Did you search the defendant's house on that day?

A. No, not search in the sense of we go and look for stuff.

Q. Okay. What did you do?

A. We asked for a shotgun.

Q. And did they provide a – why did you do that? Why did you ask them for a shotgun?

A. To see if they had one.

Q. And at that point, were they aware that you were investigating a murder?

A. Yes.

Q. How did they know that?

A. That's what we told them we were there about.

Q. And did they obtain – what's a consent to [30] search?

A. A consent to search is a form that we fill out and have the people read and sign that says: You don't need a search warrant, I will let you look or give you what you need without a search warrant. It's just – you don't have to have a search warrant – if a policeman comes up to you and asks for a consent to search, you have the right as a citizen – you now, here, let me read this form and you sign it, you can search my house or business or whatever.

Q. I'm sorry.

A. And we have them read and sign that form. They volunteered and read and signed the form.

MS. GARCIA: May I approach, Your Honor?

THE COURT: Yes, ma'am.

Q. (By Ms. Garcia) Let me show what's been marked as State's Exhibit No. 26. Do you recognize that (indicating)?

A. Yes, I do.

Q. What is that, Sergeant Elliott?

A. That is my original handwritten consent to search form. English on one side, Spanish on the other. Both Genevevo and his father signed the form.

Q. Is this consent to search form in State's No. 26 in the same condition as it was back on the date [31] that you executed it?

A. Yes, it is.

MS. GARCIA: Your Honor, at this time we'd offer State's 26 and tender to defense counsel.

(State's Exhibit No. 26 Offered)

MR. McWILLIAMS: No objections to State's 26, Judge.

THE COURT: State's 26 is admitted without objection.

(State's Exhibit No. 26 Admitted)

Q. (By Ms. Garcia) Now, on the front side of that, can you explain to the jury what that says? Don't read it, but kind of a general brief explanation.

A. It gives the date and time that you are there, the person that is reading and signing it. It identifies who they are giving permission to, myself and Sergeant Wendel of the police department to conduct a search of their residence. It gives the location and where it is. And that they give up their rights and authorize me to seize anything related to the crime. And they signed it.

Q. And who signed the front of that?

A. The front of it is signed by Genevevo Salinas.

Q. Is that the defendant that is here today?

A. Yes, it is.

[32]

Q. And what about on the back?

A. The back is the same form in Spanish.

Q. And does it say basically the same thing?

A. In Spanish, yes.

Q. Okay.

A. It's in the grammatical format of Spanish and it was read and signed by the father.

Q. And what – were you present when he signed that?

A. Yes, I was.

Q. Okay. Thank you, Sergeant.

So, based on getting a consent to search form signed from the defendant and his dad, what did you do?

A. Asked to see the shotgun.

Q. I'm sorry. I didn't hear you.

A. Well, I asked to see the shotgun. Geno said – responded and then the father went and brought the shotgun to us.

Q. Okay. And what was Geno's response, Mr. Salinas' response?

A. That his father had a shotgun.

Q. And just to clarify, is that the defendant that said that?

A. The defendant said that his father had a [33] shotgun.

Q. And were they both present at this time?

A. Yes.

Q. During the time that you were – and where were y'all standing during this conversation?

A. In the front doorway area.

Q. Of the location where?

A. No. 250 Deboll in Houston, Harris County, Texas.

Q. Now, while you were standing there having this conversation, I believe, you said it was you and Sergeant Wendel, the defendant, and his father.

A. Correct.

Q. Did anybody say anything about ballistics at that time?

A. We said that we needed to check the gun and . . .

Q. Was there any conversation about ballistics comparisons or the fact that you thought that you we're [sic] going to take the gun to be tested for shotgun pellet comparison to a gun? Any conversation at all?

A. Yes. We talked about checking it against the casings at the scene.

Q. You talked to him about that at his home?

A. No, we did not. We did not, not there at Deboll.

Q. How many years ago was this investigation, [34] Sergeant Elliott?

A. January '92. So, 16 years, 17 years ago.

Q. January of '92 or '93?

A. This was January '93. I'm sorry. The case was in '92.

Q. And do you have your offense report there with you?

A. Yes, I do.

Q. And why did your bring the offense report today?

A. Because it's been a long time ago and there's a lot of details about this case and many other cases in between that. And that's the reason I make this, you know, the details of it.

Q. Is that why you prepare an offense report?

A. Yes, it is.

Q. So, just to clarify. While you were at the defendant's home, was there any conversation about ballistics science or comparison of weapons to ammunition found at the scene?

A. No.

Q. In your opinion, Sergeant Elliott, did most people know about ballistic comparisons back in 1992?

A. No.

Q. Was it as common, say for example, as fingerprints analysis? I mean, everybody knows you can [35] compare fingerprint, right? Is that a "yes"?

A. That's a yes. I'm sorry.

Q. Okay. So, back in 1992, early 1993, that was before we had all the CSI shows and things like that, right?

A. Correct.

Q. So, would your average person know about shotgun ballistics –

MR. McWILLIAMS: Objection. That calls for speculation, Judge.

THE COURT: Sustained.

Q. (By Ms. Garcia) Did the defendant say anything to you while you were at his home on that day? Anything additional? I mean, I know he said my dad has a shotgun, but did he say anything additional to you?

A. No.

MS. GARCIA: Your Honor, may I approach the witness again?

THE COURT: Yes, ma'am.

MS. GARCIA: Your Honor, this weapon has been checked outside the presence of the jury, but we ask it be checked again.

THE COURT: Yes, ma'am.

MS. GARCIA: It's safe, Your Honor.

THE COURT: Thank you.

[36]

MS. GARCIA: Thank you.

Q. (By Ms. Garcia) Sergeant Elliott, let me show what's been marked as – I'm sorry, I apologize.

Let me show you what's been marked as State's Exhibit 25. Can you identified [sic] that (indicating)?

A. It's the shotgun that we recovered from the defendant, Genevevo Salinas, on the date in January.

Q. Thank you.

And how do you know it's the same shotgun?

A. I recognize it, the serial number on it, and the make and model of it.

MS. GARCIA: Your Honor, at this time, we'd offer State's Exhibit 25 and tender to defense counsel for any objections.

(State's Exhibit No. 25 Offered)

MR. McWILLIAMS: No objection.

THE COURT: State's 25 is admitted without objection.

(State's Exhibit No. 25 Admitted)

Q. (By Ms. Garcia) So, after they handed you the shotgun that's just been admitted as State's 25, at this point they knew you were there for a murder investigation, right?

A. Yes.

[37]

Q. Did the defendant say anything to you at that time like –

MR. McWILLIAMS: Objection. That's asked and answered, Judge.

THE COURT: Overruled.

Q. (By Ms. Garcia) Did the defendant say anything to you at that time, like –

MR. McWILLIAMS: Judge, I object to leading.

THE COURT: Sustained.

Q. (By Ms. Garcia) Was any explanation offered when this shotgun was turned over to you?

A. None.

Q. Anything like, I lent that to so-and-so?

MR. McWILLIAMS: Objection to the leading.

THE COURT: Don't lead your witness, Ms. Garcia.

Q. (By Ms. Garcia) Any explanation given that would explain –

MR. McWILLIAMS: Objection, asked and answered, Judge.

THE COURT: Overruled. Let me hear the question, please.

Q. (By Ms. Garcia) Was there any explanation given to you at that time from this defendant that would [38] explain somebody else maybe being in possession of that gun?

A. None.

Q. What did you do with this weapon, with this shotgun, State's 25, after you recovered it?

A. Took custody of it and carried it to have it compared against the casings recovered at this crime scene.

Q. That's the casings you talked about earlier?

A. Yes.

Q. Did you take it to the fingerprints lab or the ballistics lab?

A. Ballistics.

Q. And why did you choose to take it to the ballistics lab?

A. Fingerprints wouldn't tell me anything that I didn't already know or prove anything relating to the crime. It was over a month after the crime. Fingerprints on the gun wouldn't say – even if I found a set of pristine prints on the gun, I didn't know when the prints would have been placed on the gun. They could have been placed on it 10 minutes before I got there while it was in the back room of the house, or whatever, wherever it was. It could have been placed on there – you know, there was nothing tying fingerprints [39] on the shotgun to the crime scene.

Q. Okay. And can you tell us a little bit about what the ballistic tests that you were trying to – that you submitted it for?

A. Ballistics tests would show if that was the gun used in the homicide.

Q. After you took custody or possession of the shotgun there, did you have any other contact with the defendant?

A. We asked him to come downtown and talk to us and get elimination prints from him.

Q. Okay. Is that shotgun a firearm?

A. Yes, it is.

Q. Is that weapon capable of causing death or serious bodily injury?

A. Very much so.

Q. So, when you took him down – where you – when you asked him to go down to the station with you on January 28th of 1993, about what time of the day was this?

A. 6:30, 6:40 in the evening.

Q. And we talked about this a little bit earlier on direct and we said we'd clear it up later. When he was taken downtown to talk to you about the case, was he under arrest at that time?

[40]

A. No, he was not.

Q. Was he – did you request that he go or demand that he go?

A. We asked him to. Please, we appreciate it, thank you. He wasn't handcuffed. He wasn't in custody.

Q. Did he agree to go with you?

A. Yes.

Q. Was he free to leave at that time Sergeant Elliott?

A. Yes.

Q. So, you get to the station and you're having a conversation with him. Is it kind of in a question-and-answer form at this point?

A. Yes.

Q. And did you illicit [sic] responses from him? Did you ask him about Hector and Johnny Garza?

A. Yes.

Q. What did you ask him?

A. I asked him about how he knew them, when was the last time he had been there, that type of thing.

Q. And did he answer you?

A. Yes.

Q. What did he tell you?

A. He said he knew them through Mike Provazek and that he had been over the apartment the night before the [41] killing took place and that he had been over to the apartment a total of three to four times.

MS. GARCIA: Your Honor, may we approach?

THE COURT: Yes, ma'am.

(At the Bench, on the record)

MS. GARCIA: Your Honor, there was a Motion in Limine granted that we would not be going into the defendant remaining silent when asked if the ballistics from this shotgun were going to match the shotgun shells found at the apartment. And at this time, we'd like to be able to go into that and show Sergeant Elliott's testimony. The defendant was not in custody at this time. He was free to leave and he was merely there for investigatory purposes.

THE COURT: Was this part of the same conversation that we just heard?

MS. GARCIA: Yes, Your Honor, same conversation.

MR. McWILLIAMS: Judge, I renew my same objection, that he has – he can invoke the Fifth Amendment privilege whether he was in custody or not. He doesn't have to talk to the police.

THE COURT: Okay. I agree, but unless you know that, in fact, he did do that.

MR. McWILLIAMS: He remained silent, Judge.

[42]

THE COURT: Okay. Thank you.

MS. GARCIA: Thank you, Your Honor.

(Open court, defendant and jury present)

THE COURT: Approach the bench, please.

(At the Bench, off the record)

(Open court, defendant and jury present)

Q. (By Ms. Garcia) So, I believe you just testified that he admitted that he knew Hector and Johnny –

A. Correct.

Q. – Hector and Johnny Garza. Did you ask him about Mike Provazek?

A. Yes.

Q. And what did he answer – did he answer?

A. Yes.

Q. What did he say?

A. That he knew him, he was acquainted with him, and that's how he had met Hector and Johnny.

Q. Did you ask them any questions, Sergeant Elliott, about the night before the murder?

A. Yes.

Q. And did he answer them?

A. Yes.

Q. What did he tell you?

A. He said he had been to the apartment with [43] Mike.

Q. What apartment was he referring to?

A. Hector and Johnny's.

Q. Did you ask him any questions about previous trips to the apartments?

A. Just described being there three to four times.

Q. And he answered that question?

A. Yes.

Q. Did you ask him any questions about Damien Cuellar?

A. Yes.

Q. And did he answer you?

A. Yes.

Q. And what did he say?

A. He described him as a mutual friend of his and Mike's.

Q. Did he also know John and Hector?

A. Yes.

Q. Did you ask him about any disagreements or arguments any of these parties may have had?

A. Yes.

Q. And did he answer that question?

A. Yes.

Q. What did he say?

A. There had not been any disagreements or [44] arguments with the complainants.

Q. Did you ask him if he had any other weapons besides the shotgun we see here as State's 25?

A. I did.

Q. And did he answer that question?

A. Yes, he did.

Q. And what did he say?

A. He said he had no other weapons.

Q. Did you ask him, Sergeant Elliott, if the shotgun in question here would match the shells recovered at the scene of the murder?

A. Yes.

MR. McWILLIAMS: I renew that objection.

THE COURT: The objection is overruled.

Q. (By Ms. Garcia) You can answer the question.

A. Yes, I did ask him that.

Q. And what was his answer?

A. He did not answer.

Q. Did he make any motions after that? Did he –

A. Yes.

Q. What did he do?

A. Showed signs of deception.

Q. And what were they?

MR. McWILLIAMS: Object to that, Judge, as calling for speculation.

[45]

THE COURT: Sustained.

MR. McWILLIAMS: I'd ask that the jury be instructed to disregard that.

THE COURT: The jury – the objection is sustained. The jury will disregard the last statement of the officer.

Q. (By Ms. Garcia) Sergeant Elliott, what specifically did the defendant do after he remained silent when you asked him that question?

A. Looked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up.

Q. Did you continue to question him after this?

A. Yes.

Q. And did you ask him – did he answer any more questions?

A. Yes.

Q. He continued to answer questions?

A. Yes.

Q. Did you ask him what he did at the time of the murder? Did you ask him where he was at the time of the murder?

A. He said he was at – yes, I did.

Q. And did he answer you?

A. Yes, he did.

[46]

Q. And what did he say?

A. He said he was at home.

Q. Did you ask him why he wasn't at work that day?

A. Yes, I did.

Q. Did he answer that question?

A. Yes, he did.

Q. And what did he say?

A. He said he didn't go to work because he was hung over, but he called in and said he had car trouble.

Q. Did you ask him if anybody had seen him at home during the time of the murder?

A. Yes.

Q. And did he answer that question?

A. Yes, he did.

Q. And what did he say?

A. He said no one had seen him, could corroborate, or back up what he was saying.

Q. So, Sergeant Elliott, approximately how many questions would you say the defendant answered on that evening of your conversation?

A. I've never counted the questions before because this was just talking.

Q. Well, let me ask it this way if that's difficult to answer. About how long did this conversation last, if you remember?

[47]

A. Two minutes short of an hour.

Q. So, in this 58 minutes that you talked to Genevevo Salinas on January 28th of 1993, how many questions did he not answer?

A. One.

Q. Sergeant Elliott, now that you knew that Genevevo Salinas had been in Hector and Johnny's – well, Hector's apartment the night before, what did that tell you about the fingerprints?

A. They would not have changed anything.

Q. And why is that?

A. He said he was there and fingerprints don't leave a timestamp. Fingerprints could have been put there before the murder and you wouldn't know if they were done during the murder or not short of having proof that it was not there before.

Q. So, at this point, it would be unimportant to compare those prints from the murder scene?

A. Correct.

Q. Now, was this conversation that you had on January 28th of 1993 with Genevevo Salinas the first time that you had a conversation with him about ballistic matching?

A. Yes.

Q. And after this conversation, was the defendant [48] arrested?

A. We checked him, found he had warrants, and arrested him.

Q. And what were the warrants for?

A. They were traffic warrants, capias pro fines.

Q. So, what changed from before this conversation to after this conversation to cause you to take him into custody?

A. My opinion.

Q. And how did your opinion change?

A. I had the opinion that he was deceptive and lying to me and I wanted to hold onto him.

Q. Now, let's go to the next date, January the 29th of 1993. How long could you hold them at this point?

A. City of Houston will let us hold a prisoner 24 hours without charging them with a crime.

Q. And did you do that? Did you – did you hold him for at least 24 hours?

A. He was actually – We had a warrant to hold him. We didn't have the – we had another – the traffic warrants were the reasons we technically arrested him, but he had become a suspect in the homicide.

* * * *

PETITIONER'S BRIEF

RECORD AND BRIEFS

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No. 12-246

IN THE

Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari
to the Texas Court of Criminal Appeals

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* warnings.

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OTHER AUTHORITIES

Kassin, Saul M., *Inside Interrogation: Why Innocent People Confess*, 32 Am. J. Trial Advoc. 525 (2009) 19

Levy, Leonard W., Origins of the Fifth Amendment (1968) 15, 19

Sampson, Robert J. & Bartusch, Dawn J., *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 Law & Soc'y Rev. 777 (1998) 22

BRIEF FOR PETITIONER

Petitioner Genovevo Salinas respectfully requests that this Court reverse the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (Pet. App. 1a) is published at 369 S.W.3d 176. The opinion of the Texas Court of Appeals (Pet. App. 7a) is published at 368 S.W.3d 550. The relevant order of the trial court is unpublished but is referenced at Pet. App. 10a.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on April 25, 2012. Pet. App. 1a. That court denied a timely filed petition for rehearing on June 6, 2012. Pet. App. 24a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment states in relevant part that "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

This Court has made clear that the Fifth Amendment privilege against self-incrimination forbids the prosecution from using a defendant's silence during trial or custodial questioning as substantive evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965); *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966). This case presents the question whether the Fifth Amendment likewise protects a defendant's silence during pre-custodial, pre-*Miranda* questioning from use as substantive evidence of his guilt at trial when he does not testify.

1. In late 1992, Juan and Hector Garza were shot and killed in their apartment. A witness heard shots fired early that morning and saw a man run from the Garzas' apartment building to "a dark-colored Camaro or Trans Am." Pet. App. 7a-8a. Harris County police officers found shotgun shell casings in the apartment, but no other physical evidence. Their investigation revealed that the Garzas had hosted a party the night before, and officers began searching for suspects from that gathering. *Id.* 8a.

Officers learned that petitioner Genovevo Salinas had attended the Garzas' party, and began to consider him a suspect in the murders. Several weeks after the killings, two police officers went to the Salinas family home. J.A. 7. The officers spoke with Salinas and his father, both of whom cooperated fully with their investigation. Salinas and his father signed a "consent to search" form. *Id.* 8. Salinas told the police that his father owned a shotgun. *Id.* 9. And Salinas' father produced the weapon upon request. *Id.* The officers asked Salinas to accompany them to the police station to provide "elimination

prints." *Id.* 14; *see also id.* 3 (State explaining at pretrial hearing that the police asked him to come down to the station "to take photographs and to clear him as [a] suspect"). He agreed. *Id.* 14.

Salinas and the officers arrived at the police station around 6:30 in the evening. J.A. 14. The two officers showed Salinas into an interview room at the police station, and began questioning him about his relationship with the various people who had been at the party. *Id.* 15-17. "Salinas was never handcuffed and was free to leave" at any time during the interview. Pet. App. 23a. "*Miranda* warnings, therefore, were neither issued nor required." *Id.*[1]

After the officers asked whether any of the other attendees had "disagreements" with the Garzas, their inquiry abruptly pivoted to Salinas himself. J.A. 17. The officers asked him whether his father's shotgun "would match the shells recovered at the scene of the murder." *Id.* Salinas remained silent, refusing to respond to the question. *Id.* 17-18. According to Sergeant Elliott, one of the questioning officers, Salinas also "[l]ooked down at the floor, shuffled his

---

[1] It has long been settled that if police officers *Mirandize* an interviewee, the Due Process Clause forbids the prosecution from using any silence against him at trial. *See Doyle v. Ohio*, 426 U.S. 610 (1976). The transcript from the first trial in this case (as well as the offense report, which was never referenced or introduced into evidence) suggested that the officers may have *Mirandized* Salinas at some point during his stationhouse interview. *See* First Trial Tr. 42 (June 25, 2008). But no such suggestion was made by either party during the second trial. Salinas and the State, therefore, have proceeded on this appeal on the belief that the police never *Mirandized* Salinas before his critical silence.

feet," and tightened up. *Id.* 18. Officers then asked Salinas about other topics, such as where he had been the morning of the shootings. Salinas answered that he had been at home that morning, and answered the other questions as well. *Id.* 18-19.

After the interview, which lasted fifty-eight minutes, the questioning officers decided to arrest Salinas on outstanding traffic fines. Pet. App. 12a. The next day, a ballistics report suggested that the shotgun owned by Salinas' father matched the casings found at the Garzas' apartment. *Id.* 12a-13a. Yet the district attorney found the evidence insufficient to charge Salinas with murder, and ordered him released. *Id.* 13a.

Several days later, police procured an additional statement from Damien Cuellar, another attendee present at the Garzas' party. Pet. App. 13a. Cuellar had already given two statements to police that had not implicated Salinas, but Cuellar now said that he "felt compelled to come forward" again after being visited by the ghosts of the Garza brothers in "a dream." *Id.* In this third statement, Cuellar claimed that while he and Salinas shared some scrambled eggs, Salinas had confessed that he had committed the killings. Second Trial Tr. vol. 4, at 178-79 (Mar. 11, 2009).

Based on this alleged confession, the district attorney charged Salinas with murdering Juan and Hector Garza. Police did not locate Salinas until 2007, when they found him living in the same county under a different name. Pet. App. 13a.

2. At trial on the charge of killing Juan Garza, the State maintained that Salinas had attended the party at the Garzas' apartment, returned several

hours later with his father's shotgun, and killed both men. The prosecution conceded to the jury that "we don't have motive." First Trial Tr. 30 (June 26, 2008). But it argued in closing that the jury should convict Salinas based on the ballistics report matching the shotgun to the shells found at the Garzas' apartment, Cuellar's revised statement to police that Salinas had confessed to the murders, and Salinas' effort to elude arrest after he was released. *Id.* 26-31.

During this trial, the State placed little emphasis on Salinas' silence during police questioning. Sergeant Elliott did not mention Salinas' failure to respond to his question regarding the shotgun shells during his direct examination, referencing it only briefly during the re-direct. First Trial Tr. 49 (June 25, 2008). In closing, the prosecutor referred to Salinas' silence during pre-arrest questioning only in passing. *See* First Trial Tr. 26 (June 26, 2008).

Salinas did not testify. His attorney argued that others had motives to commit the murders, and attacked the State's three pieces of evidence. First Trial Tr. 5 (June 26, 2008).

After hours of deliberation, the jury was hopelessly deadlocked, so the judge declared a mistrial. Pet. 4.

3. The State elected to re-try Salinas. Before trial, defense counsel asked the trial court to make clear that the Fifth Amendment's prohibition against compelled self-incrimination barred the State from referencing Salinas' silence during his pre-arrest interview. J.A. 3-5. The State disagreed, contending that Salinas' silence was admissible. *Id.* The trial court deferred a final ruling until trial. *Id.* 5.

Once again, Salinas did not testify at trial. Yet unlike the first trial, the prosecution relied heavily on Salinas' silence during police questioning, characterizing it as a "very important piece of evidence." J.A. 4. Over the defense's renewed objection, the judge permitted Sergeant Elliott to testify at length during direct examination about Salinas' silence when asked whether the casings found at the Garzas' apartment would match his father's shotgun. *Id.* 17-18. The officer emphasized that Salinas "did not answer" that question. *Id.* 17.

During closing arguments, the prosecutor highlighted this evidence, arguing that Salinas' silence demonstrated his guilt:

> The police officer testified that [Salinas] wouldn't answer that question. He didn't want to answer that. Probably the first time he realizes you can do that. What? You can compare those? You know, if you asked somebody – there is a murder in New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [sic] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say: What are you talking about? I didn't do that. I wasn't there. He didn't respond that way. He didn't say: No, it's not going to match up. It's my shotgun. It's been in our house. What are you talking about? He wouldn't answer that question.

Pet. App. 18a.

The jury found Salinas guilty of murder. Pursuant to Texas law, the jury also was asked to determine a proper sentence. Even though murder is punishable by up to life in prison and the prosecution maintained that Salinas had actually killed both Garza brothers, the jury imposed only a twenty-year sentence and a five thousand dollar fine.

After this sentence was imposed, the State dismissed the charge of killing Hector, reserving its right to refile if the judgment against Juan is reversed.

4. The Texas Court of Appeals affirmed the judgment. As is pertinent here, Salinas argued that the prosecution's use of his pre-arrest silence violated the Fifth Amendment. Specifically, he urged that the logic of *Griffin v. California*, 380 U.S. 609 (1965), bars the prosecution from commenting not only on a defendant's silence at trial or during custodial interviews, but also on silence during pre-custodial, pre-*Miranda* interviews.

The court acknowledged that numerous federal and state appellate courts "have held that pre-arrest, pre-*Miranda* silence is not admissible as evidence of guilt." Pet. App. 21a.[2] But the court sided instead

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[2] For a selection of these decisions, see *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir.) (Bownes, J., joined by Breyer and Gray, JJ.), *cert. denied*, 493 U.S. 969 (1989); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir.), *cert. denied*, 531 U.S. 1035 (2000); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); *State v. Moore*, 965 P.2d 174, 180-81 (Idaho 1998); *Baumia v.*

with the minority view, rejecting Salinas' argument that the prosecution's use of his pre-arrest silence had violated the Fifth Amendment. The court reasoned that "[t]here was no government compulsion in the pre-arrest, pre-*Miranda* questioning in which Salinas voluntarily participated for almost an hour." Pet. App. 23a. Therefore, "the Fifth Amendment privilege against self-incrimination was not triggered." *Id.*

5. A divided Texas Court of Criminal Appeals affirmed. Pet. App. 1a-6a. The court acknowledged that under this Court's decision in *Griffin*, the Fifth Amendment "prohibit[s] the state from commenting on a defendant's refusal to testify at trial." Pet. App. 3a. But the court declined to consider whether the same kind of prosecutorial argumentation that *Griffin* prohibits is present when the prosecution contends that silence during a pre-arrest, pre-*Miranda* interview is evidence of guilt. *Id.*

Instead, like the Court of Appeals, the Court of Criminal Appeals treated the Fifth Amendment as prohibiting only the type of physical and psychological compulsion involved in *Miranda*. It thus found no Fifth Amendment problem in this case because "[i]n pre-arrest, pre-*Miranda* circumstances, a suspect's interaction with police officers is not compelled." Pet. App. 6a. The Court of Criminal

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Commonwealth, ___ S.W.3d ___, 2012 WL 5877581, at *2-5 (Ky. 2012); *State v. Rowland*, 452 N.W.2d 758, 763 (Neb. 1990); *State v. Cassavaugh*, 12 A.3d 1277, 1285-87 (N.H. 2010); *State v. Leach*, 807 N.E.2d 335, 339-42 (Ohio 2004); *State v. Easter*, 922 P.2d 1285, 1291-93 (Wash. 1996); *State v. Fencl*, 325 N.W.2d 703, 710 (Wis. 1982).

Appeals buttressed this reasoning with citations to *Jenkins v. Anderson*, 447 U.S. 231 (1980), in which this Court allowed prosecutorial use of silence for impeachment purposes and Justice Stevens noted – in the context of someone failing to seek out the police to report an incident – that the Fifth Amendment is "simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." Pet. App. 6a (quoting *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring)).

Judge Johnson dissented, and Judge Myers did not participate. Pet. App. 6a.

Petitioner sought rehearing, but the Texas Court of Criminal Appeals denied the request without comment. Pet. App. 24a.

6. This Court granted certiorari. 133 S. Ct. ____ (2013).

SUMMARY OF ARGUMENT

The Fifth Amendment prohibits the prosecution from using a defendant's silence in the face of pre-arrest, pre-*Miranda* questioning against him as part of its case-in-chief at trial.

I. Under the rule of *Griffin v. California*, 380 U.S. 609, 615 (1965), the prosecution may not use a defendant's failure to testify or to respond to custodial questioning against him at trial. The prosecutorial use of such silence compels the defendant to be a witness against himself because it leaves him no avenue to avoid incriminating himself. If he speaks, his words can be used against him; and if he refuses to speak, the prosecution can argue that his silence is evidence of guilt.

The *Griffin* rule – first enunciated in the nineteenth century and incorporated against the states almost a half-century ago – is now "an essential feature of our legal tradition." *Mitchell v. United States*, 526 U.S. 314, 330 (1999). The rule preserves our forebears' decision to reject an inquisitorial system of justice. It also protects against wrongful convictions, by preventing juries from assigning undue meaning to silence that is, in actuality, insolubly ambiguous.

The reasons for the *Griffin* rule are equally applicable in the context of a refusal to answer questions during a pre-arrest, pre-*Miranda* interview with law enforcement. As at trial and during custodial interrogation, using a person's silence in the face of pre-arrest, pre-*Miranda* questioning against him would leave the person no way to avoid creating evidence against himself. Such a regime also would hark back to inquisitorial practices and risk wrongful convictions by allowing prosecutors – as in this case – to argue to juries that "[a]n innocent person" would have answered the police's accusations. Pet. App. 18a. Such arguments threaten to shift the burden of proof and are highly prejudicial, given that silence in the face of police questioning is in reality so indeterminate that some states deem it irrelevant as a matter of state evidence law.

II. The Texas Court of Criminal Appeals erred in suggesting that this Court's decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Jenkins v. Anderson*, 447 U.S. 231 (1980), somehow render the *Griffin* rule inapplicable here.

Miranda and its progeny hold that custodial interrogation imposes such physical and psychological pressure on suspects that the police must issue special warnings designed to dispel that inherently coercive atmosphere. But this requirement does not mean that custody is necessary to trigger the Fifth Amendment. To the contrary, *Griffin*-style compulsion has nothing to do with custody. And this Court has recognized that the right to remain silent applies in a vast array of noncustodial settings – from inquiries by congressional investigative committees to the IRS's requests for information on tax returns. If the law were otherwise, legislatures could criminalize the refusal to respond to noncustodial questioning, and the police could cajole suspects into speaking by advising them that remaining silent would create evidence of guilt for trial.

In *Jenkins*, after the defendant testified that he had acted in self-defense, this Court held that the prosecution was allowed to introduce his failure to seek out the police following the altercation as impeachment evidence. This holding rested on the law of impeachment: When a defendant testifies at trial, he exposes himself to cross-examination based on previously inadmissible evidence. This rationale obviously does not apply where, as here, the defendant never testifies and the prosecution uses his silence as part of its case-in-chief. Nor does Justice Stevens' separate comment that the Fifth Amendment was "irrelevant" under the facts of *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring in the judgment), support the Texas Court of Criminal Appeals' decision. As Justice Stevens himself observed, once the police initiate contact with a

suspect, the Fifth Amendment right to remain silent kicks in. *Id.* at 243. And once that right is triggered, the *Griffin* rule must be triggered along with it.

ARGUMENT

I. Using Petitioner's Refusal To Answer A Police Officer's Pre-Custodial Question Against Him At Trial Compelled Him To Be A Witness Against Himself In Violation Of The Fifth Amendment.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This provision guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan* 378 U.S. 1, 8 (1964). In *Griffin v. California*, 380 U.S. 609, 614-15 (1965), this Court held that the prosecution's use of a defendant's silence at trial against him imposes a penalty in violation of the Fifth Amendment. This Court later made clear that this rule also applies to a person's silence during custodial police questioning.

The *Griffin* rule applies equally here. Using a defendant's silence during noncustodial police questioning against him as substantive evidence of guilt at trial penalizes his decision to remain silent, insofar as it compels him to become a witness against himself regardless of whether or not he decides to speak.

A. The *Griffin* Rule Prohibits Using A Defendant's Silence During Trial Or Custodial Questioning As Substantive Evidence Against Him.

1. Almost from the inception in the nineteenth century of laws allowing defendants to testify at their own criminal trials, this Court and many state supreme courts forbade the prosecution from arguing that a defendant's failure to testify indicated guilt. *See, e.g.*, *Wilson v. United States*, 149 U.S. 60 (1893); *Commonwealth v. Scott*, 123 Mass. 239 (1877); *Austin v. People*, 102 Ill. 261 (1882). This Court constitutionalized and incorporated that rule against the states in *Griffin v. California*, 380 U.S. 609 (1965), holding that prosecutorial comment on a defendant's decision to remain silent at trial is a form of compelled self-incrimination barred by the Fifth Amendment. Prosecutorial comment turns even the exercise of the constitutional right into incriminating evidence, because a defendant, in the words of the Fifth Amendment, has no way to avoid being "a witness against himself." U.S. Const. amend. V. Either he takes the stand or his refusal to do so is treated as evidence indicating his guilt. In other words, "unconstitutional compulsion [i]s inherent in a trial where prosecutor and judge [a]re free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand." *Lakeside v. Oregon*, 435 U.S. 333, 339 (1978).

This Court has held that the *Griffin* rule applies to a defendant's silence not only at trial (including sentencing, *see Mitchell v. United States*, 526 U.S. 314, 317 (1999)), but also outside of courtroom proceedings as well. In *Miranda v. Arizona*, 384 U.S.

436 (1966), this Court made clear that when a person decides to remain silent after being properly advised of his rights, the Fifth Amendment forbids the prosecution from using that silence against him at trial. *Id.* at 468 n.37. Citing *Griffin*, the Court explained that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Id.*

2. The *Griffin* prohibition against treating silence as incriminating evidence has become "an essential feature of our legal tradition." *Mitchell*, 526 U.S. at 330. This is so for two primary reasons: (a) it preserves our accusatorial system of justice; and (b) it protects innocent defendants from wrongful convictions.

a. The *Griffin* rule furthers the conscious choice by our forebears to reject an inquisitorial system of justice. "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974). These inquisitions were prefaced by an oath *ex officio* in which the subject of interrogation was "bound [] to answer all questions posed to him on any subject." *Miranda*, 384 U.S. at 459. This oath created a "cruel trilemma" during the subsequent questioning: a truthful response could be self-incriminating; a false response would expose the person to retribution for lying; and silence could also result in punishment. *Tucker*, 417 U.S. at 440, 445. By the middle of the

seventeenth century, English law forbade this "odious" practice, establishing the common-law right against self-incrimination. *Brown v. Walker*, 161 U.S. 591, 597 (1896). The right "did not prohibit inquiry nor even incriminating interrogatories, but it did permit a refusal to answer without formal prejudice or penalty." Leonard W. Levy, Origins of the Fifth Amendment 313 (1968).

"So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law." *Brown*, 161 U.S. at 597. The Fifth Amendment therefore guarantees that "the State which proposes to convict and punish an individual [must] produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Mitchell*, 526 U.S. at 326 (emphasis and internal quotation marks omitted); *accord Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

Allowing the government to comment on a defendant's silence at trial would perpetuate a "remnant" of the odious inquisitorial system. *Griffin*, 380 U.S. at 614. Just like someone forced to submit to the oath *ex officio*, a modern target of governmental interrogation would have to choose between potential self-incrimination by testifying or certain self-incrimination by remaining silent. *See Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). *Griffin* accordingly proscribes putting someone in such a bind.

b. The *Griffin* rule also sustains the Fifth Amendment's purpose of preventing wrongful

convictions. While sometimes maligned as a shelter for the guilty, the right to remain silent is frequently a "protection to the innocent." *Murphy*, 378 U.S. at 55; *accord Mitchell*, 526 U.S. at 329-30.

A defendant who is "entirely innocent of the charge against him" may choose not to speak due to "[e]xcessive timidity" and "nervousness when facing others and attempting to explain transactions of a suspicious character." *Wilson v. United States*, 149 U.S. 60, 66 (1893). He might "fear that he will be made to look bad by clever counsel," *Portuondo v. Agard*, 529 U.S. 61, 67 (2000), or that answering a police officer's questions will force him to reveal intimate details of his life that he would prefer to keep private. In short, rather than exonerate him, an innocent defendant's testimony or responses during custodial interrogation might instead "confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." *Wilson*, 149 U.S. at 66.

Yet while a defendant's motivation for invoking his right to remain silent may be entirely innocent, "[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." *Lakeside*, 435 U.S. at 340 n.10 (internal quotation marks and citation omitted). Indeed, this natural inclination can be so strong that defendants are entitled to have trial judges instruct juries that they may not draw any adverse inference from a defendant's decision not to testify. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981). The centrality of the right to remain silent to ensuring just outcomes demands no less.

B. The Logic Of The *Griffin* Rule Equally Prohibits Using A Defendant's Refusal To Respond To Pre-Custodial Questioning As Substantive Evidence Against Him.

1. For all of the same reasons that prosecutorial comment on a defendant's silence at trial or during custodial questioning amounts to compulsory self-incrimination, introducing evidence of a defendant's silence during pre-custodial questioning likewise violates the Fifth Amendment. Just as the prosecutor in *Griffin* asked the jury to infer guilt from the defendant's refusal to take the stand, the prosecutor in this case told the jury that "an innocent person" would have responded with fervent denials of guilt to police insinuations that his shotgun was used to commit the killings. Pet. App. 18a. Accordingly, just like the defendant in *Griffin*, Salinas had no option when questioned by the police but to become a witness against himself. Regardless of whether he responded to their questions or remained silent, he was creating evidence the prosecution could use against him at trial.

The parallel is even stronger with respect to the Fifth Amendment's prohibition against using someone's silence during a custodial interrogation against him. *See Miranda*, 384 U.S. at 468 n.37. Just as a rule allowing prosecutorial comment on such silence would compel a suspect to become a witness against himself, so too would allowing comment on the refusal to answer a police officer's question in a noncustodial interview. In short, "unconstitutional compulsion [i]s inherent" under *Griffin* whenever the prosecutor is free to ask the

jury to draw adverse inferences from a defendant's failure to answer police questions. *Lakeside*, 435 U.S. at 339.

Indeed, allowing prosecutorial comment on the defendant's refusal to respond to law enforcement's pre-arrest questioning – while forbidding it with respect to trial or post-arrest questioning – would seriously undermine *Griffin* itself. As then-Justice Rehnquist observed for the Court:

> The natural concern which underlies many of [this Court's Fifth Amendment] decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage. For example, a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury.

Tucker, 417 U.S. at 440-41.

The same reasoning applies here as well. If the prosecution were free to argue that the defendant's refusal to answer officers' pre-arrest questions indicates that he is guilty as charged, then the defendant would feel extra pressure to take the stand to offer an alternative explanation for his silence. Even if the defendant could resist that extra pressure, the prosecutor's argument that the jury *should* infer guilt from the defendant's refusal to answer pre-arrest questioning would still be problematic. At the very least, it would likely sap any instruction telling the jury that it *should not*

draw any adverse inference from the defendant's refusal to testify of any genuine effect.

2. Barring prosecutors from using a defendant's pre-arrest silence as substantive evidence of guilt effectuates the purposes of the Fifth Amendment and serves the same functions as barring use of silence at trial or during custodial questioning.

a. Prohibiting the prosecution from using a defendant's pre-arrest silence in its case-in-chief preserves our accusatorial system of criminal justice.

As noted above, an essential element of the adversarial system the Framers embraced is the right to "refus[e] to answer" pretrial inquiries from law enforcement "without formal prejudice or penalty." Levy, *supra*, at 313. Yet allowing the police to produce evidence for trial simply by asking a suspect incriminating questions during a voluntary interview – then using that person's silence as evidence of guilt – would hark back to the inquisitional use of *ex officio* oaths to obtain convictions. No matter how a suspect responded to questioning, he would produce evidence against himself: Truthful answers might provide incriminating information, even for those innocent of wrongdoing. *See, e.g.*, Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 Am. J. Trial Advoc. 525, 537 (2009) (noting that "being innocent can itself become a source of vulnerability" during police interrogation). False statements could form the basis of a criminal charge. *See, e.g.*, 18 U.S.C. § 1001(a)(2); Tex. Penal Code Ann. § 37.08. And remaining silent would itself be substantive evidence of guilt. Put another way, the defendant would be forced into a "veritable 'Catch 22'": "[i]f both

[his] prearrest speech and silence may be used against" him, then he would have "no choice that will prevent self-incrimination." *State v. Fencl*, 325 N.W.2d 703, 711 (Wis. 1982).

If anything, allowing prosecutorial comment on silence in the face of pre-arrest questioning would be more inquisitorial in nature than allowing such comment on the failure to testify at trial. A prosecutor at trial may not force the defendant to take the stand and decline to answer specific questions about the allegations at issue. *See Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *United States v. Housing Found. of Am.*, 176 F.2d 665, 666 (3d Cir. 1949). Yet there is no bar against police officers "approaching an individual on the street or in another public place, [] asking him if he is willing to answer some questions, [and] putting questions to him if the person is willing to listen." *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); *see also United States v. Monia*, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting). Thus – as the facts of this case vividly illustrate, *see* Pet. App. 18a – prosecutorial comment on pre-arrest silence in the face of law enforcement questioning has the potential to be more targeted, and more damning, than such comment on a defendant's general refusal to testify.[3]

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[3] Another potential scenario further illustrates the point: Under the rule adopted by the Texas Court of Criminal Appeals, the police might invite someone in for voluntary questioning, videotape the interview, and then spring incriminating questions on the interviewee. Even if the person declined to answer the questions, the prosecutor could play that tape for the jury and argue that the person's silence demonstrated guilt. It

b. Applying the *Griffin* rule to pre-arrest police questioning likewise protects the innocent from unjust conviction. Just as persons may choose not to testify at trial or to respond to custodial interrogation for many reasons unrelated to guilt, persons likewise often choose not to respond to pre-arrest police questioning for reasons unrelated to guilt.

For starters, Justice Jackson famously noted that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring). People who know they are suspects of law enforcement investigations and have consulted with counsel, therefore, may decline to make pre-arrest statements to police simply because their lawyers have told them not to do so. Indeed, sophisticated businesspersons who are implicated in white-collar investigations commonly refuse to speak to law enforcement for just this reason. *See generally* Amicus Br. of Am. Bd. of Criminal Lawyers.

Even people who have not yet consulted with counsel may similarly choose not to speak with police simply because they believe silence is their right. Nearly forty years ago, this Court observed that "virtually every schoolboy is familiar with the concept, if not the language" of the privilege against self-incrimination. *Tucker*, 417 U.S. at 439; *see also, e.g.*, *Ex parte Marek*, 556 So. 2d 375, 381 (Ala. 1989). It is hard to imagine any adult today unaware of his

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is hard to conceptualize such a procedure as anything other than compelling the defendant to be a witness against himself.

right to "plead the Fifth." *See, e.g.*, *Weitzel v. State*, 863 A.2d 999, 1004-05 (Md. 2004). Thus, a person's refusal to respond to police questioning may simply indicate his familiarity with our Bill of Rights.

Moreover, certain segments of our society are especially apt to exercise the right to remain silent for cultural or historical reasons. "[I]t is a lamentable but undeniable fact of modern society" that many residents of high-crime neighborhoods "harbor a mistrust for law enforcement authority which leads them to shun contact with the police even when the avoidance of contact is not in their own best interest." *People v. Conyers*, 420 N.E.2d 933, 935 (N.Y. 1981) (internal citation omitted). In such communities, "individuals may refrain from speaking to law enforcement officials not because they are guilty of some crime, but rather because they are simply fearful of coming into contact with," or responding to questions from, "those whom they regard as antagonists." *Id.*; *see also* Robert J. Sampson & Dawn J. Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 Law & Soc'y Rev. 777 (1998).

Other possibilities abound why "an innocent person" may not "object[] when confronted with a baseless accusation" in a noncustodial setting. *Marek*, 556 So. 2d at 381. As the Alabama Supreme Court has noted, "the accused might well remain silent because he is angry, or frightened." *Id.* Indeed, he may be indignant at the accusation and wish to avoid dignifying it with a response. Someone questioned by police officers may alternatively be ashamed or embarrassed about certain associations

or transactions that he does not want to reveal. Or he may have a poor memory or cognitive deficits and accordingly feel vulnerable to artful or persistent questioning. Whatever the reason, silence in the face of pre-custodial police questioning is so insolubly ambiguous that several states deem it flatly inadmissible as a matter of state evidence law. *See Weitzel*, 863 A.2d at 1002 (Maryland); *People v. Welsh*, 80 P.3d 296, 299 (Colo. 2003); *Landers v. State*, 508 S.E.2d 637, 638 (Ga. 1998); *Marek*, 556 So. 2d at 382 (Alabama); *People v. DeGeorge*, 541 N.E.2d 11, 12-13 (N.Y. 1989).

Yet despite the limited probative value of a defendant's silence in the face of pre-arrest police questioning, there is a serious danger that jurors will infer a great deal from it. This Court has recognized that "[t]oo many, even those who should be better advised . . . too readily assume that those who invoke [the privilege] are either guilty of crime or commit perjury in claiming the privilege." *Mitchell*, 526 U.S. at 329 (quoting *Ullmann v. United States*, 350 U.S. 422, 426 (1956)). This case illustrates the point: in the first trial, the prosecution barely referenced the defendant's pre-arrest silence, and the jury hung. Pet. 3-4. The prosecution shifted tactics in the second trial, making the defendant's silence during his interrogation a central part of its closing argument, Pet. App. 18a-19a, and won a conviction. The Bill of Rights simply cannot tolerate such tactics.

II. Neither *Miranda*'s Requirements For Custodial Interrogation Nor *Jenkins*' Rule Regarding Silence As Impeachment Evidence Supports Withholding The Fifth Amendment's Protections Here.

The Texas Court of Criminal Appeals did not really dispute that the form of compulsion present in *Griffin* is also present when prosecutors use pre-arrest silence in the face of government questioning as substantive evidence at trial. Pet. App. 3a. Instead, it declared that pre-arrest silence is "considerably less protected from being commented upon at trial." *Id.* As support for that proposition, the Texas Court of Criminal Appeals referenced two lines of cases from this Court. First, it noted that the physical and psychological compulsion that requires *Miranda* warnings before commencing custodial questioning is not present in pre-custodial law enforcement questioning. Second, the court relied upon *Jenkins v. Anderson*, 447 U.S. 231 (1980), and *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam), in which this Court held that the prosecution may use pre- and post-arrest silence against a defendant in order to impeach his testimony at trial. Neither of these lines of cases renders the *Griffin* rule inapplicable here.

A. *Miranda* Does Not Restrict The Privilege Against Self-Incrimination To Custodial Police Interrogations.

The Texas Court of Criminal Appeals' observation that "[i]n pre-arrest, pre-*Miranda* circumstances, *a suspect's interaction with police officers* is not compelled," Pet. App. 6a (emphasis added), is true but also irrelevant. Salinas' claim

here is based on a form of compulsion (*Griffin*-style compulsion) that does not depend on custody. And that claim is borne out by this Court's precedent, as well as Fifth Amendment first principles, which make clear that the Self-Incrimination Clause applies not only in the context of custodial interrogation but also when an individual is subject to governmental inquiries before being arrested or *Mirandized*.

1. *This Court's Jurisprudence Refutes Any Attempt To Limit The Privilege Against Self-Incrimination To The Custodial Context.*

The Texas Court of Criminal Appeals' conclusion that persons enjoy no right to remain silent unless they are in custody contravenes numerous Fifth Amendment decisions. It also misconstrues the reasoning of *Miranda*.

a. This Court has repeatedly held or assumed that the right to remain silent applies in the face of governmental questioning outside of a custodial setting. *Griffin*'s prohibition against prosecutorial comment on the defendant's failure to testify, for example, has never been thought to depend on whether the defendant is in custody at the time of trial. Rather, the prohibition applies regardless of whether the defendant was ever formally arrested.

Numerous other decisions make clear that the right to remain silent applies in the face of noncustodial governmental questioning outside of the courtroom. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), for instance, the Court noted that even though people are not "in custody" during traffic stops or other kinds of *Terry* stops, subjects of such detentions need not respond to police questioning.

Id. at 439. And long before that case, this Court deemed it a "settled principle" that "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969); *accord Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion) (While police officers may ask a person to answer questions voluntarily, "[t]he person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.").

Indeed, this Court has recognized that the privilege against self-incrimination "is applicable to investigations as to all forms of governmental [inquiries]," whether or not any kind of detention is involved. *Watkins v. United States*, 354 U.S. 178, 188 (1957); *see also Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (privilege applies to "official questions put to [someone at trial or] in any other proceeding, civil or criminal, *formal or informal*, where the answers might incriminate him in future criminal proceedings" (emphasis added)). The Court has thus applied the privilege to protect a witness before a congressional investigating committee, *Watkins*, 354 U.S. at 196; the subject of a noncustodial inquiry into state gambling by a court-appointed referee, *Malloy v. Hogan*, 378 U.S. 1, 14 (1964); and individuals whom the state attorney general wished to question in a noncustodial manner during an investigation, *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967).

Furthermore, this Court has held that the privilege applies in a defendant's interactions with the state before any investigation or face-to-face

contact has even begun. In *Marchetti v. United States*, 390 U.S. 39 (1968), the defendant challenged his conviction under a federal statute that required him to provide information to the Internal Revenue Service concerning wagering activities. He argued that the statute violated the Fifth Amendment insofar as it required him to divulge information in his tax return that could form the basis of a state prosecution for illegal gambling. *Id.* at 42-44. The Court held that the assertion of the privilege was a "complete defense" to such attempted government compulsion. *Id.* at 60.

To be sure, the forms of compulsion present in these various cases were different than the form at issue here. But the cases conclusively establish that the Fifth Amendment prohibition against compelled self-incrimination applies to pre-custodial interactions with law enforcement. And as explained in Part I, the form of compulsion recognized in *Griffin* is present when the refusal to answer pre-custodial questions may be introduced at trial as substantive evidence of guilt.

b. This Court's reasoning in *Miranda* confirms that the fact of custody does not define the contours of the Fifth Amendment privilege. In *Miranda* and its progeny, this Court has held that when suspects are placed in police custody, they face "inherent" psychological compulsion to respond to police questioning. *Miranda*, 384 U.S. at 458; *see also Beckwith v. United States*, 425 U.S. 341, 347 (1976) (limiting need to give *Miranda* warnings to custodial context). These "inherent pressures of the interrogation atmosphere" can "compel [a suspect] to speak where he would not otherwise do so freely."

Miranda, 384 U.S. at 467-68. As such, police must take the extraordinary step of providing explicit warnings to custodial subjects before any such interrogation to ensure that any statements given are truly voluntary. *Id.* at 479.

But this Court made clear in *Miranda* itself that even after the police dispel the compulsion inherent in a custodial setting by means of the required warnings, the *Griffin* rule continues to prohibit the prosecution from using the person's silence against him. *Miranda*, 384 U.S. at 468 n.37. That is because the physical and psychological compulsion inherent in custodial interrogation is entirely distinct from the compulsion present if the prosecution may use silence in the face of police questioning as substantive evidence of guilt. Nothing about *Miranda*'s holding that physical and psychological compulsion exists only during custodial interrogations dictates that the form of compulsion *Griffin* prohibits must be similarly confined.

Put another way, custody and the attendant giving of *Miranda* warnings "do[] not suddenly endow a defendant with a new constitutional right" to remain silent. *Baumia v. Commonwealth*, ___ S.W.3d ___, 2012 WL 5877581, at *4 (Ky. Nov. 21, 2012) (quoting *Green v. Commonwealth*, 815 S.W.2d 398, 400 (Ky. 1991)). The warnings simply advise him of the right he already had against compelled self-incrimination. And the *Griffin* rule applies whenever the right may be legitimately exercised.

2. *First Principles Confirm That The Fifth Amendment Applies To Noncustodial Police Questioning.*

Even if it were an open question under this Court's precedents whether the privilege against self-incrimination applies to pre-custodial questioning, the text, structure, and purpose of the Fifth Amendment confirm that the privilege against self-incrimination applies in that context.

a. The text of the Fifth Amendment – particularly when viewed in the larger context of the Bill of Rights – indicates that the right to remain silent extends beyond custodial interrogation. Whereas the rights conferred by the Fifth Amendment apply to any "person," U.S. Const. amend. V, the rights enumerated in the Sixth Amendment are limited to the "accused," *id.* amend. VI. As such, many of the rights of the Sixth Amendment – the right to counsel, for example – "attach[] only at or after the initiation of adversary proceedings against the defendant." *United States v. Gouveia*, 467 U.S. 180, 187 (1984). The Founders' choice to use different words in the two amendments, which were drafted and passed contemporaneously, indicates that the Fifth Amendment privilege must attach before any accusation is leveled. *See Counselman v. Hitchcock*, 142 U.S. 547, 562 ("The object [of the privilege] was to insure that a person should not be compelled, when acting as a witness in *any investigation*, to give testimony which might tend to show that he himself had committed a crime." (emphasis added)).

Moreover, the Founders' use of the phrase "witness against" in the Fifth Amendment is

significant in light of the exact same language in the Sixth Amendment's Confrontation Clause. *Compare* U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a *witness against* himself." (emphasis added)), *with* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall . . . be confronted with the *witnesses against* him." (emphasis added)). This Court has already held that a subject of noncustodial police questioning becomes a "witness against" the defendant for purposes of the Sixth Amendment when the prosecution introduces that subject's statements at trial. *See Davis v. Washington*, 547 U.S. 813, 822 (2006); *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004). The Fifth Amendment's use of the identical phrase "witness against" must have at least the same scope.

b. The purposes underlying the Fifth Amendment confirm that it applies to noncustodial interrogation. Indeed, holding otherwise would upend our accusatorial system of criminal justice.

i. It is critical to appreciate the fact that if the privilege did not to apply to noncustodial inquiries, it would be perfectly legal for the government to compel its citizens to provide incriminating information so long as the police did not place them in custody. The government could, for instance, simply make it a crime to refuse to respond to officers' questions during noncustodial investigatory interviews. The government could also impose significant noncriminal penalties for refusing to answer a given inquiry. *See, e.g.*, *Gardner v. Broderick*, 392 U.S. 273 (1968) (dismissal from public employment); *Lefkowitz*, 414 U.S. at 71 (cancellation of public

contracts with state). Any such laws would degrade our accusatorial system of justice.

ii. Experience shows that police departments themselves will sometimes exploit perceived limitations in the reach of this Court's Fifth Amendment jurisprudence. *See, e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 617 (2004) (considering "question-first" police tactic); *People v. Dunbar*, ___ N.Y.S.2d ___, 2013 WL 361822, at *1 (App. Div. Jan. 30, 2013) (considering police practice of "systematically" interviewing suspects "just prior to arraignment or, in other words, immediately before those individuals' indelible right to counsel would attach" and reading a "script" formulated to encourage the uninformed waiver of *Miranda* rights). Thus, police officers would also likely take advantage of any decision limiting reach of the *Griffin* rule to custodial questioning. Under the rule adopted by the Texas Court of Criminal Appeals, police officers could advise a suspect that he should answer their pre-arrest questions because if he does not, his silence will be used as evidence of his guilt. NACDL has provided an example of such "advice" an officer might give:

> Joe, you don't have to answer my questions, but if you don't, then that's going to be used as evidence that you're guilty. The prosecutor is going to stand in front of that jury and tell them that an innocent man would answer my questions.

NACDL Amicus Br. Supporting Cert. 5. Thus cornered for questioning and knowing that his silence will be treated as evidence of guilt, the subject of a noncustodial interrogation would be forced into

making a quick, uninformed decision on whether to respond.

Police officers in this scenario will have done nothing wrong; to the contrary, they will merely have accurately stated the law. But it takes little reflection to perceive that many people would succumb to this type of tactic and that it would undercut Fifth Amendment values.

If the privilege against self-incrimination did not apply to noncustodial interrogation, then law enforcement officers would have an incentive to subvert the Fifth Amendment in another manner as well. Namely, as several courts have observed, officers would have reason to delay arresting people (particularly suspects of white collar and other nonviolent offenses) and accordingly to "delay administering *Miranda* warnings." *State v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004); *accord State v. Easter*, 922 P.2d 1285, 1290 (Wash. 1996); *Tortolito v. State*, 901 P.2d 387, 390 (Wyo. 1995). So long as officers did not place suspects in custody, they could generate evidence by asking them specified, incriminating questions. Even if the suspects refused to answer, those refusals would be admissible at trial as in the prosecution's case-and-chief and would enable the government's attorneys, as here, to argue to the jury that an innocent defendant would have answered. *See Leach*, 807 N.E.2d at 341; Pet. App. 18a-19a. Yet once the officers placed the suspect under arrest, they would lose the ability to create such helpful evidence.

Such an arbitrary distinction should not prevail. It would incentivize investigating officers, contrary to "the central purpose" of the Fifth Amendment, to

enlist the defendant as an "unwilling instrument in his or her own condemnation," *Mitchell*, 526 U.S. at 329 – instead of "requiring the government in its contest with the individual to shoulder the entire load," *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (internal quotation marks and citation omitted). *See also Tortolito*, 901 P.2d at 390. There is no justification for encouraging officers to revert to such inquisitorial practices.

B. Nothing In *Jenkins* Calls For A Contrary Result.

In *Jenkins v. Anderson*, 447 U.S. 231 (1980), the defendant testified at trial that he had stabbed someone in self-defense. The prosecution sought to undercut that testimony by noting that Jenkins had not reported the incident to the police for two weeks. This Court held that this use of Jenkins' "silence" for such impeachment purposes did not violate the Fifth Amendment. *Id.* at 238. Justice Stevens concurred in the judgment, stating that the Fifth Amendment was "simply irrelevant" to the defendant's decision in that "prearrest context" to refrain from approaching the police. *Id.* at 241, 243 (Stevens, J., concurring in the judgment).

For reasons it declined to elaborate, the Texas Court of Criminal Appeals found "the reasoning in Justice Stevens' concurrence [in *Jenkins*] to be relevant and persuasive." Pet. App. 6a n.17. But none of the opinions in *Jenkins* supports the Texas Court of Criminal Appeals' refusal to apply the *Griffin* rule to pre-custodial questioning.

1. The Texas Court of Criminal Appeals' reliance on Justice Stevens' concurrence rests on a fundamental misunderstanding of that separate

opinion. Although Justice Stevens reasoned that the prosecution could use Jenkins' silence "in a prearrest context" against him, Justice Stevens sharpened his point in the very next sentence: "The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence *before he has any contact with the police.*" *Jenkins*, 447 U.S. at 243 (Stevens, J., concurring in the judgment) (emphasis added). Thus, it is clear that Justice Stevens' reference to the "prearrest context" during which the Fifth Amendment does not apply refers to the time period before a suspect faces any questioning at all from police, not simply the time period before he is taken into custody.

Lest there be any doubt, Justice Stevens explained in *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), that the Fifth Amendment applies to pre-arrest interactions with the police. Citing the "settled principle" from *Davis* that police may not compel a suspect to answer pre-arrest questions, Justice Stevens wrote that "there is no reason why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser [Fifth Amendment] protection." *Hiibel*, 542 U.S. at 192-93 (Stevens, J., dissenting).[4]

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[4] The majority did not disagree with this assertion. Rather, it held that the information the police sought in *Hiibel* (the defendant's identification) "presented no reasonable danger of incrimination." 542 U.S. at 189. Obviously, the same could not be said here.

2. To the extent that the Texas Court of Criminal Appeals thought that the majority's holding in *Jenkins v. Anderson*, 447 U.S. 231 (1980), supported its refusal to apply the *Griffin* rule to silence during pre-custodial questioning, *see* Pet. App. 3a-4a, it was also mistaken. In *Jenkins*, this Court held that pre-arrest silence is admissible as impeachment evidence if a defendant chooses to testify at trial because (a) the defendant waives his privilege against self-incrimination by taking the stand; and (b) impeachment evidence "advances the truth-finding function of the criminal trial." *Jenkins*, 447 U.S. at 235, 238. In *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam), this Court extended that holding to post-arrest, pre-*Miranda* silence.

In contrast to *Jenkins* and *Fletcher*, however, the prosecution here introduced petitioner's silence as substantive evidence during its case-in-chief. Consequently, neither of the justifications for *Jenkins*' holding applies here.

a. The waiver principle in *Jenkins* arises from a criminal defendant's decision to testify at trial. This Court has long recognized that "[t]he safeguards against self-incrimination" apply only to "those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel v. United States*, 271 U.S. 494, 499 (1926). Accordingly, when the defendant chooses "to cast aside his cloak of silence," he exposes himself to prosecutorial cross-examination based on any prior statements or other evidence and whatever adverse inferences the jury might draw from it. *Jenkins*, 447 U.S. at 238; *see also Harris v. New York*, 401 U.S. 222 (1971) (voluntary statements taken in violation of *Miranda* become admissible

when defendant testifies); *Walder v. United States*, 347 U.S. 62 (1954) (same regarding evidence obtained in violation of Fourth Amendment). Otherwise, the Fifth Amendment would allow defendants to create exculpatory evidence while immunizing themselves against potentially inculpatory questioning. *See Mitchell*, 526 U.S. at 322; *Brown v. United States*, 356 U.S. 148, 155 (1958).[5]

But here, petitioner did not testify. He never chose to relinquish his "cloak of silence," and therefore retained all of the privilege's protections. *Jenkins*' waiver rationale is therefore entirely inapposite.

b. Nor does either of the ways in which the *Jenkins* impeachment rule "advances the truth-finding function of the criminal trial" apply here. *Jenkins*, 447 U.S. at 238.

First, when a defendant chooses to testify, he puts his credibility at issue. *Id.* Thus, this Court has explained that while *Griffin* "prohibit[s] comments

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[5] Outside the presence of the factfinder, of course, a defendant's decision to speak about some things while invoking the Fifth Amendment to decline to speak about others does not create evidence for the defense, so it neither waives the privilege nor undercuts the "truth-finding function of the criminal trial," *Jenkins*, 447 U.S. at 238. This Court's application of the privilege to selective exercises of the right to remain silent in grand jury testimony, congressional hearings, and custodial interrogation illustrates this point. *See, e.g.*, *Hoffman v. United States*, 341 U.S. 479, 481, 486-88 (1951) (grand jury testimony); *Quinn v. United States*, 349 U.S. 155, 158 & n.8 (1955) (testimony before congressional subcommittee); *Edwards v. Arizona*, 451 U.S. 477, 485-87 (1981) (custodial interrogation).

that suggest a defendant's silence is 'evidence of *guilt*,'" that principle does not bar similar statements attacking the defendant's "*credibility as a witness*." *Portuondo v. Agard*, 529 U.S. 61, 69 (2000) (emphases in original). Here, petitioner declined to testify. Therefore, the State's comment on his pre-arrest silence could not in any way reflect on his credibility as a witness.

Second, the *Jenkins* impeachment rule enhances the reliability of the criminal trial by protecting against, and ferreting out, perjury. As this Court has previously explained, "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Harris*, 401 U.S. at 225. When – as here – the defendant remains silent at trial, he offers no sworn testimony of his own, so this anti-perjury rationale simply cannot apply.

* * *

The rule against allowing the prosecution to comment on a defendant's silence during trial or custodial questioning is "an essential feature" of our adversarial system. *Mitchell*, 526 U.S. at 330. This Court should confirm what the majority of federal and state appellate courts already recognize: The rule applies for all of the same reasons to refusals to respond to pre-*Miranda*, pre-custodial questioning by agents of law enforcement.

CONCLUSION

For the foregoing reasons, the judgment of the Texas Court of Criminal Appeals should be reversed.

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RESPONDENT'S BRIEF

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Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

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QUESTION PRESENTED

Does the admission into evidence of a defendant's selective, transitory silence during voluntary, non-custodial police questioning violate the Fifth Amendment privilege against compelled self-incrimination, absent an invocation of the Fifth Amendment privilege and absent a showing that such evidence was compelled, testimonial, and incriminating?

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Langbein, The Privilege and Common Law Criminal Procedure, in The Privilege Against Self-Incrimination (Helmholz et. al. eds. 1997) 29

T. Barlow, The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate (1745) 28

STATEMENT OF THE CASE

Throughout his Brief on the Merits, Salinas has made repeated references to his first trial, Pet. Br. 3 n.1, 5, 6, 23, at which the evidence showed a materially different set of facts surrounding the interview. The court reporter's record for Salinas's first trial is not part of the appellate record, and there is no evidence that it was a part of the record before the trial judge at the second trial, the Fourteenth Court of Appeals, or the Texas Court of Criminal Appeals. In Texas, appellate courts review trial court rulings in light of what was before the trial court at the time that the ruling was made. *Weatherred v. State,* 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

Nevertheless, during the first trial, the testimony revealed that Salinas had received *Miranda* warnings and waived them before agreeing to answer the officer's questions. The prosecutor also referred to Salinas's silence during closing argument in the first trial in response to defense counsel's closing argument. As Salinas acknowledges, no evidence regarding his receipt of *Miranda* warnings was noted by either party during the second trial, and such evidence is not part of the appellate record. Pet. Br. 3 n.1. This information is offered in candor to the Court so that the Court can make a full and informed disposition of the case, including a determination as to whether the issue is fairly presented to the Court. *Cf. Rogers v. United States,* 522 U.S. 252, 253 (1998) (plurality opinion); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

I. The offense

On December 18, 1992, Houston Police Department (HPD) officers responded to the execution-style murders of brothers Juan "Johnny" Manual Garza, the complainant, and Hector Garza. 4.RR.41-43, 67-69, 258. The brothers died as a result of multiple close-range shotgun wounds. 4.RR.241-254; 5.RR.15. Neither Johnny nor Hector had any defensive wounds. 4.RR.256-257.

Two days after the murders, Genovevo Salinas, the Petitioner, went to John Damien Cuellar's house. 4.RR.177-178. While holding his hand on his .45 caliber handgun, Salinas admitted that he went to Hector's apartment and killed Johnny and Hector. 4.RR.177-185, 189, 224-226. Cuellar told Salinas not to joke around, but Salinas said, "I'm not lying." 4.RR.179-180. Cuellar did not tell the police about Salinas's admissions until February 1, 1993. 5.R.R.57.

II. The non-custodial interview

Officers eventually learned that Salinas had been partying at Hector's apartment on the night before the murders. 5.RR.24. On January 28, 1993, HPD Sergeant C.E. Elliott went to Salinas's residence and met Salinas and his father. J.A. 7; 5.R.R.24-25. He explained that he was investigating a murder and asked if Salinas had a shotgun. J.A. 6-7. Salinas and his father each signed a written voluntary consent to search the residence. J.A. 8-9. Salinas stated that his

father had a shotgun, and his father brought a black Winchester Defender shotgun to Elliott. J.A. 9, 12; 5.RR.49, 149, 250-251. Salinas did not offer any explanation when he turned the shotgun over to the police. J.A. 11-13. His father appeared very surprised, however, when Elliott unloaded the shotgun to reveal shells filled with double-aught buckshot. 5.RR.51-53.

Elliott asked Salinas if he would come downtown to talk to them and provide elimination fingerprints, and Salinas agreed. J.A. 14. He was not handcuffed and was free to leave; he was not under arrest or in custody. J.A. 14. Upon arrival at the station, Elliott asked Salinas some questions about the murders. J.A. 14-15. He asked about Johnny and Hector, about his relationship with them, and about his last time at Hector's apartment. J.A. 15. Salinas answered that he knew them through Mike Provazek, that he had been to the apartment a total of three to four times, and that he had been to the apartment on the night before the killings. J.A. 15-17.

Elliott asked Salinas about the night before the murders, and Salinas responded that he had been to Hector's apartment with Provazek. J.A. 15-16, 19. When questioned about Cuellar, Salinas answered that Cuellar was his and Provazek's friend. J.A. 16-17. When asked about any disagreements or arguments that any of the parties may have had, Salinas responded that there had not been any disagreements or arguments with Johnny and Hector. J.A. 17.

Elliott asked Salinas if he had any weapons other than the shotgun, and Salinas responded that he had no other weapons. J.A. 17. Near the end of the almost hour-long interview, Elliott asked "if the shotgun [officers recovered from Salinas's residence] would match the shells recovered at the scene of the murder?" J.A. 17. The officer testified, "He did not answer," but further stated that Salinas "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." J.A. 17-18.

The officer asked Salinas some additional questions, and Salinas continued to answer. J.A. 18. Elliott asked Salinas where he was at the time of the murders, and Salinas responded that he was at home. J.A. 18. He also asked Salinas why he was not at work that day, and Salinas answered that he did not go to work because he had been hung over, but that he had called in and said he had car trouble. J.A. 18. Finally, Elliott asked Salinas if anybody had seen him at home during the time of the murders, and Salinas responded that no one had seen him or could corroborate what he was saying. J.A. 18-19.

Salinas verbally answered all but one question during the 58-minute non-custodial police interview. J.A. 19. After the interview, officers learned that Salinas had outstanding traffic warrants, and so they arrested him on those warrants. Pet. App. 12a. The next day, January 29, 1993, officers learned that the ballistics analysis was completed; it established that the shotgun shells recovered at the scene of the

murders had been fired from the Winchester Defender shotgun recovered from Salinas. 5.RR.49. Based on this information, the officers obtained an extension to hold Salinas as a suspect in a homicide. 5.RR.49. A search of Salinas's residence pursuant to a warrant revealed double-aught buckshot ammunition. 5.RR.51. The district attorney's office, however, declined charges without additional evidence, and the officers released Salinas when the hold expired on January 30, 1993. 5.RR.54.

On February 1, 1993, Cuellar finally told the police what Salinas had told him on December 20, 1992. 5.RR.57. Elliott filed charges against Salinas and attempted to arrest him, but could not locate him at home or work. 5.RR.58-60, 127-128. Salinas had absconded, and officers spent years searching for him. 5.RR.59-63. Finally, in November 2007, Elliott learned that Salinas was in custody, after Salinas had been arrested under a different name and different date of birth. 5.RR.63-65.

III. The trial court proceedings

Salinas's first trial resulted in an eleven-to-one hung jury. 2.C.R.331, 348. At the second trial, the prosecutor sought to introduce evidence that Salinas had not answered a question during his interview with the police. J.A. 15. Salinas objected to the introduction of that evidence based on the Fifth Amendment. J.A. 15, 17. The trial court overruled the objection, and the evidence was admitted. J.A. 17.

Salinas did not testify. During closing argument, the prosecutor argued that the evidence regarding Salinas's selective, transitory silence demonstrated Salinas's guilt because an innocent person would have responded to the question. 7.RR.171-173. Salinas did not object to this argument based on the Fifth Amendment. 7.RR.171-173. The jury found Salinas guilty of murder and assessed punishment at 20 years' imprisonment and a $5,000 fine. Pet. App. 1a, 7a.

IV. The appeal

On appeal, Salinas contended that the trial court erred in admitting testimony of his pre-arrest, pre-*Miranda* silence. Pet. App. 18a. The court of appeals upheld the admission of the evidence because there was no government compulsion in the pre-arrest, pre-*Miranda* questioning in which Salinas voluntarily participated for almost an hour. Pet. App. 23a. Because the Fifth Amendment privilege against compelled self-incrimination was not triggered absent any governmental compulsion, it did not prevent the State from offering Salinas's failure to answer the question at issue. Pet. App. 23a.

The Texas Court of Criminal Appeals granted discretionary review and affirmed the court of appeals decision. Pet. App. 1a. According to the Court of Criminal Appeals, the plain language of the Fifth Amendment protects a defendant from *compelled* self-incrimination, and a suspect's interaction with police

officers is not compelled in pre-arrest, pre-*Miranda* circumstances. Pet. App. 6a. Because the evidence of Salinas's lack of a verbal response during non-custodial questioning was admissible, prosecutors may comment on such silence regardless of whether a defendant testifies. Pet. App. 6a. The Court of Criminal Appeals denied Salinas's motion for rehearing. Pet. App. 24a.

SUMMARY OF ARGUMENT

Salinas argues that evidence of his silence near the end of voluntary, non-custodial police questioning should have been excluded even though his statements themselves were admissible. He objected at trial only to the admission of the evidence that he "did not answer" one question during police questioning. J.A. 15, 17. He did not argue that he was in custody or that his responses had been coerced. And he did not object to the prosecutor drawing adverse inferences from that properly-admitted evidence during closing argument.

Salinas's arguments rest on a number of assumptions not supported by the record or the Court's precedent. Salinas's reference to his "refusal to answer" was not the invocation of the privilege against compelled self-incrimination that he implies. The Court has recently held that mere silence in the face of questioning does not constitute an invocation of the privilege against compelled self-incrimination. *Berghuis*

v. Thompkins, 130 S.Ct. 2250 (2010). And even if the Court were to subscribe to Salinas's view of the evidence, a defendant cannot anticipatorily invoke the Fifth Amendment privilege apart from police custody or coercion.

Salinas alternatively characterizes his lack of a verbal response to the officer's question as either "silence" or a "refusal to answer." But in the context of the question put to him and his physical cues attendant to his response, Salinas's "silence" was in actuality his non-verbal response, perhaps acknowledging that the shotgun shells found at the scene would match his shotgun because he knew that he had committed the murder, or perhaps realizing that the police had the capability of matching those shotgun shells to his shotgun.

Moreover, even if the Court were to consider Salinas's selective, transitory silence in isolation, that silence would necessarily lack any testimonial character. While Salinas points to a number of possible inferences to be drawn from his non-verbal conduct, silence alone fails to convey any facts or information either explicitly or implicitly. If Salinas's "silence" was neither an invocation of the privilege against compelled self-incrimination nor an implied assertion of fact when considered with his physical conduct, then it was not testimony, and therefore not covered by the Fifth Amendment.

More importantly, Salinas's interaction with police was not compelled within the meaning of the

Fifth Amendment. Historically, the Fifth Amendment was designed to prohibit the use of oaths and torture to gain a confession. It was not designed to exclude from trial the product of unsworn, voluntary, non-custodial questioning. While the Court has held that Fifth Amendment compulsion is inherent during custodial interrogation, the Court has never extended that holding to apply to non-custodial questioning. The Court has also held a number of situations to be inherently coercive under the Fifth Amendment, but none are analogous to the facts of this case. To the contrary, the Court has held that voluntary, non-custodial questioning is not inherently coercive and that the possible use of pre-trial silence at a subsequent trial does not make it so.

Nevertheless, Salinas seeks to extend the Court's holding in *Griffin v. California*, 380 U.S. 609 (1965), to apply to non-custodial questioning under the rationale that the possible use of his non-verbal responses at a later trial was inherently coercive. *Griffin*, however, is a poor analogy to this pre-trial circumstance. The choice at issue in *Griffin* occurred at trial and concerned the decision to testify; in that context, drawing adverse inferences from a clear assertion of the right to refuse to testify placed a legal penalty upon the invocation of the privilege against compelled self-incrimination. But the Court has already held that the possible use of an individual's voluntary, non-custodial communication with police is not compelled merely because of its potential use at trial. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

Moreover, *Griffin*'s underpinnings reveal that the Court's central concern was the impact that a defendant's refusal to testify had upon his presumption of innocence at trial. But the presumption of innocence is solely a trial right that the Court has not extended to pre-trial investigation.

Finally, even assuming evidence of Salinas's selective, transitory silence was improperly admitted, it was harmless beyond a reasonable doubt. The testimony regarding the silence was necessarily brief, while Salinas's physical response was properly admitted without objection, as were the rest of his statements to police. This evidence, considered in conjunction with the evidence of Salinas's efforts to prevent detection by the police and the overwhelming evidence of Salinas's guilt, clearly demonstrates beyond a reasonable doubt that the admission of Salinas's selective, transitory silence did not contribute to his conviction.

ARGUMENT

I. Salinas's selective, transitory silence was either an admission or not testimonial, but it did not constitute an invocation of the Fifth Amendment privilege against compelled self-incrimination.

The admission into evidence of Salinas's selective, transitory silence during a voluntary, non-custodial police interview did not violate the Fifth

Amendment because Salinas did not invoke the privilege against compelled self-incrimination and because he answered the question through his non-verbal conduct. Salinas does not argue that the police questioning amounted to custodial interrogation. Pet. Br. 2-3. Nor does Salinas argue that the police questioning was otherwise coercive. Pet. Br. 3 n.1.

Rather, Salinas participated in a voluntary, non-custodial interview, during which he verbally answered all but one of the officer's questions and non-verbally answered the remaining question. J.A. 14-19. Knowing that the police were investigating the deaths of Johnny and Hector, Salinas went to the police station voluntarily and freely answered police questions. Salinas was not handcuffed and was free to leave; he was not under arrest or in custody. J.A. 14; Pet. Br. 3. Near the end of the almost hour-long interview, Elliott asked "if the shotgun [officers recovered from Salinas's residence] would match the shells recovered at the scene of the murder?" J.A. 17. Elliott testified, "He did not answer," but further stated that Salinas "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." J.A. 17-18. Elliott continued to ask Salinas questions, which Salinas answered. J.A. 18.

The Fifth Amendment concerns itself primarily with the admission of statements, not the exclusion of silence. It provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Or, as

the Court has put it, "The Fifth Amendment prohibits only compelled testimony that is incriminating." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 189-90 (2004) (citing *Brown v. Walker*, 161 U.S. 591 (1896)). Thus, a defendant can rely upon the Fifth Amendment only to preclude the admission of testimonial statements. *Schmerber v. California*, 384 U.S. 757, 763-64 (1966) ("It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications[ ].").

A defendant's testimonial statements can be used against him so long as they are not compelled. *New York v. Quarles*, 467 U.S. 649, 654 (1984) ("The Fifth Amendment itself does not prohibit all incriminating admissions; '[a]bsent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.'") (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)). As the Court has noted, "[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *Washington*, 431 U.S. at 187.

The Court has also consistently held that a defendant must affirmatively invoke his privilege against compelled self-incrimination in order to rely upon the privilege contained in the Fifth Amendment. *Garner v. United States*, 424 U.S. 648, 654-55 (1976) ("[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming

the privilege, the government has not 'compelled' him to incriminate himself.").

Salinas claims that the State's subsequent use[1] at trial of his silence during non-custodial police questioning penalized his decision to remain silent, insofar as it compelled him to be a witness against himself regardless of whether or not he decided to speak. Pet. Br. 12, 17-18. Yet, Salinas concedes that "[i]n pre-arrest, pre-*Miranda* circumstances, *a suspect's interaction with police officers* is not compelled." Pet. Br. 24 (quoting Pet. App. 6a). Instead, he claims inherent compulsion "if the prosecution may use silence in the face of police questioning as substantive evidence of guilt." Pet. Br. 28. Salinas effectively claims that a defendant's silence during voluntary, non-custodial police questioning has greater protection than a defendant's statements and conduct during that same questioning.

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[1] This case presents the issue of whether the *admission* of, and not *argument* or *comment* concerning, evidence of a defendant's silence during non-custodial police questioning violates the Fifth Amendment privilege against compelled self-incrimination. Pet. App. 18a. Salinas objected only to the admission of the "did not answer" question during the police interview. He did not object to *argument* or *comment* by the prosecutor on Fifth Amendment grounds. 7.RR.173. Nor did he raise an issue on appeal as to the prosecutor's *argument* or *comment*.

A. Salinas's selective, transitory silence did not invoke the Fifth Amendment privilege against compelled self-incrimination.

While Salinas characterizes his lack of a verbal response as "silence" or a "refusal to answer," such conduct did not constitute an invocation of the privilege against compelled self-incrimination. The Court has made clear that such an invocation would be necessary to provide Fifth Amendment protection to someone in Salinas's position. *Garner*, 424 U.S. at 665.

The Court has recently held that a suspect seeking to invoke his privilege against compelled self-incrimination must do so clearly. *Berghuis*, 130 S.Ct. at 2261. In *Berghuis*, the accused was arrested and provided *Miranda* warnings but was "[l]argely" silent during the approximately three-hour custodial interrogation. *Id.*, 130 S.Ct. at 2256. About two hours and forty-five minutes into the interrogation, an officer asked Thompkins, "Do you believe in God?"; Thompkins responded "Yes," as his eyes "well[ed] up with tears." *Id.*, 130 S.Ct. at 2257. When asked, "Do you pray to God?," Thompkins also answered in the affirmative. *Id.*, 130 S.Ct. at 2257. Finally, when he was asked, "Do you pray to God to forgive you for shooting that boy down?," Thompkins again responded in the affirmative. *Id.*, 130 S.Ct. at 2257.

The Court rejected Thompkins's argument that he had invoked his privilege against compelled self-incrimination merely by remaining silent for a sufficient period of time. *Id.*, 130 S.Ct. at 2259-60. The Court explained that there is good reason to require a defendant who wants to invoke the right to remain silent to do so unambiguously. *Id.*, 130 S.Ct. at 2260. The requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Id.*, 130 S.Ct. at 2260 (quoting *Davis v. United States*, 512 U.S. 452, 458-59 (1994)). According to the Court, had Thompkins merely stated that he wished to remain silent or that he did not wish to talk with police, he would have sufficiently invoked his privilege against compelled self-incrimination. *Berghuis*, 130 S.Ct. at 2260. But his selective, transitory silence did not invoke the privilege. *Id.*

Like Thompkins, Salinas never stated during the interview that he wanted to remain silent or that he did not want to talk with the police. J.A. 17-18; *Berghuis*, 130 S.Ct. at 2260. Contrary to Salinas's suggestions, he did not invoke the Fifth Amendment privilege against compelled self-incrimination during the non-custodial police interview. *See United States v. Monia*, 317 U.S. 424, 427 (1943) ("[The Fifth Amendment] does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered

to have been 'compelled' within the meaning of the Amendment.").

Invocation is crucial because it is the infringement of the right to terminate the interview, rather than the possible evidentiary use of a response to an incriminating question, that operates on the individual to overcome the free choice in producing a statement. *See Miranda v. Arizona*, 384 U.S. 426, 473-74 (1966). Because only the witness knows whether the disclosure may incriminate him, the burden appropriately lies with him to assert his privilege at the time he is called to decide whether or not to disclose. *Garner*, 424 U.S. at 655. Garner made incriminating disclosures on his federal income tax returns instead of claiming the Fifth Amendment privilege against compelled self-incrimination. *Garner*, 424 U.S. at 665. The Court held that Garner's disclosures were not compelled incriminations even though he was compelled to file his tax return. *Id.* Therefore, he was foreclosed from later invoking his Fifth Amendment privilege when the incriminating information was introduced as evidence against him in his criminal trial. *Id.* Similarly, Salinas did not invoke the privilege against compelled self-incrimination during the non-custodial police interview and, like Garner, he cannot subsequently invoke the privilege at trial to bar the admission of evidence obtained during the non-custodial police interview.

Furthermore, where there is no official compulsion to speak, the Fifth Amendment cannot be anticipatorily invoked. *Bobby v. Dixon*, 132 S.Ct. 26, 29

(2011). Dixon had spoken with police at the police station during a chance encounter and, after receiving his *Miranda* warnings, declined to answer questions without his lawyer present. *Id.*, 132 S.Ct. at 28. Yet, five days later, police re-approached Dixon and sought to question him regarding the offense. *Id.* According to the Court, Dixon's invocation of his right to counsel was ineffective because it occurred prior to "custodial interrogation." *Id.* As the Court explained, it has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *Id.* at 29. Though *Bobby* dealt with the ability to invoke the Fifth Amendment right to counsel, the Court has made clear that there is no principled reason to treat the invocation of the privilege against compelled self-incrimination differently than the invocation of the right to counsel. *Berghuis*, 130 S.Ct. at 2260 (citing *Solem v. Stumes*, 465 U.S. 638, 648 (1984); *Fare v. Michael C.*, 442 U.S. 707, 719 (1979); *Michigan v. Mosley*, 423 U.S. 96, 103 (1975)). And while the evidentiary use of a suspect's premature invocation of the Fifth Amendment privilege may raise due process concerns, such concerns are not present in this case because Salinas did not invoke the privilege. *See Johnson v. United States*, 318 U.S. 189, 196 (1943) (holding that requirements of a fair trial prevented comment on a defendant's reliance upon the privilege asserted at trial even though it was improperly asserted to prevent cross-examination).

Moreover, the Court has held that silence is inadmissible only after an accused has received his *Miranda* warnings. *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976). In *Doyle*, the Court held that the use of post-*Miranda* silence for impeachment violated due process because "silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617. The Court, however, declined to extend *Doyle* to cover pre-*Miranda* silence. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (holding that it is the use of silence after the assurances embodied in *Miranda* that violates due process). In *Fletcher*, the Court tacitly acknowledged that one may not readily assume that a suspect is exercising the privilege against compelled self-incrimination because the suspect simply remained silent. Thus, under the facts of this case and the Court's clear precedent, Salinas's selective, transitory silence was not an invocation of the Fifth Amendment privilege against compelled self-incrimination. Because he did not invoke the Fifth Amendment privilege during police questioning, Salinas could not later invoke it at trial to preclude admission of the product of that voluntary, non-custodial police questioning. *Garner*, 424 U.S. at 665.

B. While Salinas characterizes his lack of a verbal response as "silence" or a "refusal to answer," Salinas was not "silent" for the purposes of the Court's Fifth Amendment jurisprudence because he answered the officer's question through his non-verbal conduct.

Although Salinas characterizes Elliott's testimony that he "did not answer" a question as "silence," it is clear from the entire interview that his response to the question was not merely sitting in silence. Rather, Salinas physically responded to Elliott's question. His response conveyed, at least to Elliott, his answer to the question in a way that mere silence could not. One plausible inference is that Salinas agreed that the shotgun shells found at the scene would match the shotgun he had produced for the police. And this response was admissible as an assertion.

"Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923). Indeed, the failure to contest an assertion can be considered evidence of acquiescence to that assertion if it would have been natural under the circumstances to object to the assertion in question. *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976).

In *Baxter*, the Court distinguished the use of Palmigiano's silence from those cases where the total refusal to submit to interrogation was treated as a final admission of guilt rather than merely a piece of

evidence. *Baxter*, 425 U.S. at 318 ("There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him . . . his silence was given no more evidentiary value than was warranted by the facts[ ]."); *cf. Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967). Here, Salinas's selective, transitory silence was simply treated as a piece of evidence and given the weight deemed appropriate by the jury as with any other alleged admission.

Salinas would likely respond that his acquiescence to the officer's assertion under the rationale outlined in *Baxter* is itself compulsion because it would require him to object even though he had no obligation to speak. But this argument assumes that Salinas's selective, transitory silence somehow suggested he was prevented from clearly asserting the privilege against compelled self-incrimination or even terminating the interview. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (holding that interaction with police at police station was voluntary where suspect's freedom to depart was not restricted in any way). It also assumes that his response was an assertion of his privilege against compelled self-incrimination despite his failure to invoke it. *Cf. Berghuis*, 130 S.Ct. at 2260 (holding that mere silence did not invoke the privilege against compelled self-incrimination). And it overlooks that Salinas voluntarily continued to make himself a witness by answering questions even after

Elliott asked him about the shotgun shells. Even Salinas concedes that "[i]n pre-arrest, pre-*Miranda* circumstances, *a suspect's interaction with police officers* is not compelled." Pet. Br. 24 (quoting Pet. App. 6a).

Salinas's response to the question of whether the shotgun shells at the scene would match his shotgun constituted the type of assertion envisioned in *Baxter*, yet made in the context of a non-coercive, voluntary police interview. *Mathiason*, 429 U.S. at 495. Moreover, the possible use at trial of Salinas's selective, transitory silence during a voluntary, non-custodial police interview had no more coercive effect on Salinas's decision-making than the use of verbal responses during non-custodial police questioning. *See Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984) (upholding the admissibility of responses made during non-custodial roadside questioning). Because Salinas was under no official compulsion at the time of questioning, his physical, non-verbal response to the officer's incriminating question was just as admissible as the statements on the roadside in *Berkemer* or at the stationhouse in *Mathiason*.

C. Salinas's selective, transitory silence was not testimonial and therefore not protected by the Fifth Amendment privilege against compelled self-incrimination.

Salinas will undoubtedly reject characterizing his response to the officer's question as a non-custodial, incriminating admission. And, as discussed above, his selective, transitory silence during police questioning is not an invocation of the privilege against compelled self-incrimination. Therefore, if the issue presented is the admissibility of Salinas's lack of a verbal response, divorced from the circumstances of the questioning and his non-verbal response, as Salinas seems to argue, that lack of a verbal response necessarily failed to disclose any incriminating information or relate any incriminating factual assertions.

As the Court made clear in *Pennsylvania v. Muniz*, the privilege against compelled self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (quoting *Schmerber*, 384 U.S. at 761). "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States*, 487 U.S. 201, 210 (1988). The privilege does not protect a suspect from being

compelled by the State to produce "real or physical evidence." *Schmerber*, 384 U.S. at 761-62.

In *Muniz*, the Court rejected the argument that Muniz's answer to the question about his sixth birthday was non-testimonial by explaining that the State's characterization of the response addressed the wrong question; the State focused upon the incriminating inferences drawn from the response rather than whether the response itself was a testimonial act or physical evidence. *Muniz*, 496 U.S. at 593. The Court explained that the definition of "testimonial" evidence under the Fifth Amendment "must encompass all *responses* to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the 'cruel trilemma.'"[2] *Id.*, 496 U.S. at 597 (emphasis added). Thus, the vast majority of "*verbal* statements" will be "testimonial" because there are very few instances "in which a *verbal* statement,

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[2] Notably, the Court still contemplated that there must be a response to the incriminating question and did not limit the consideration of whether that response is testimonial to a mere inquiry into whether the question asked was incriminating. The Court went on to explain that a response must explicitly or implicitly convey facts or information in response to an incriminating question in order to be testimonial. *Muniz*, 496 U.S. at 597. Here, Salinas's selective, transitory silence, considered without reference to his physical cues, did not convey any facts or information regardless of whether the question asked was incriminating. And because Salinas's selective, transitory silence by itself did not communicate any explicit or implicit facts, it was necessarily non-testimonial and not covered by the Fifth Amendment.

either oral or written, will not convey information or assert facts." *Id.* (quoting *Doe*, 487 U.S. at 213) (emphasis added).

Similarly, the Court held that a defendant's signed consent directive authorizing the release of foreign bank records did not implicate the privilege against compelled self-incrimination because it did not convey any facts or assertions. *Doe*, 487 U.S. at 204. The consent directive authorized the release of any and all accounts over which Doe had a right of withdrawal, without acknowledging the existence of any such account. *Id.* When Doe refused to sign the consent directive by affirmatively invoking his privilege against compelled self-incrimination, the trial court held him in contempt and confined him until he complied with the order to sign the directive. *Id.*, 487 U.S. at 205. Significantly, the Court acknowledged that the consent directive was obviously compelled and assumed without deciding that it would also be incriminating by providing a link in the chain of evidence leading to Doe's indictment. *Id.*, 487 U.S. at 207.

Yet, on the question of whether the compelled consent directive was testimonial, the Court held that it was not. According to the Court, the privilege against compelled self-incrimination reflected a judgment that the prosecution should not be free to build up a criminal case, in whole or in part, with the assistance of enforced *disclosures* by the accused. *Id.*, 487 U.S. at 212 (emphasis in the original); *see also Ullmann v. United States*, 350 U.S. 422, 427 (1956).

The Court also likened the consent directive to acts by the defendant that did not fall within the privilege even though the acts themselves might have been incriminating. *Doe*, 487 U.S. at 210. Regardless of whatever possible legal effect the defendant's signature had, it did not communicate any implicit or explicit factual assertions. *Id.*, 487 U.S. at 210-11.

The logic of *Doe* and *Muniz* necessitates a holding that Salinas's selective, transitory silence was non-testimonial. While Salinas's conduct may have given rise to incriminating inferences of guilt, his selective, transitory silence, isolated from his non-verbal conduct, was necessarily void of any communicative value. It did not communicate facts or information any more than the defendant who authorized the release of bank records by signing a consent directive in *Doe*. *Doe*, 487 U.S. at 215. As the Court emphasized in *Doe*, the Fifth Amendment is concerned with forced *disclosures* by an accused. For the same reason, Salinas's reliance upon cases such as *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006) is misplaced. Those cases are not examples of compelled testimony, and the witnesses in those cases actually disclosed information. If Salinas seeks to argue that his lack of a verbal response was not, by itself, an implied assertion of fact, then his silence necessarily failed to convey any information, lacked testimonial character, and was not a clear assertion of the privilege against compelled self-incrimination.

Salinas points out the many possible non-incriminating reasons that a suspect might invoke his privilege against compelled self-incrimination. Pet. Br. 22-23. But the inferences from Salinas's conduct would provide no support for his proposition that his selective, transitory silence alone communicated either explicitly or implicitly facts or information. Salinas effectively concedes that his "silence" did not communicate any information to police when he argues that his silence was "insolubly ambiguous" due to the many reasons a suspect may choose to remain silent. Pet. Br. 22-23. And, arguing that his "silence" carried with it an adverse inference of guilt falls into the same problem faced by the State in *Muniz*. Pointing to the possible adverse inferences from his conduct only illustrates the incriminating nature of the evidence, not its testimonial character. *Muniz*, 496 U.S. at 593.[3] Thus, Salinas's selective, transitory silence during a voluntary, non-custodial police interview was not testimonial, and therefore not protected by the Fifth Amendment absent a clear assertion of the privilege against compelled self-incrimination.

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[3] Any "innocent" inferences drawn from his response, even if testimonial, would not be incriminating by definition. *Hiibel*, 542 U.S. at 190-91 (holding that Hiibel's refusal to disclose his name was not incriminating because it was not based upon any articulated real and appreciable fear that his name could be used to incriminate him).

II. Salinas was not compelled to be a witness against himself.

As Justice Kennedy has observed: "The 'Amendment speaks of compulsion,' . . . and the Court has insisted that 'the constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony.'" *McKune v. Lile*, 536 U.S. 24, 35-36 (2002) (citations omitted). The sole concern of the Fifth Amendment is governmental coercion. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). The Fifth Amendment privilege against compelled self-incrimination is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion." *Oregon v. Elstad*, 470 U.S. 298, 305 (1985). The privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. *Miranda*, 384 U.S. at 460.

"Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him." *Doe*, 487 U.S. at 212 (referencing the ecclesiastical courts and the Star Chamber as an "inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source."). At its core, the privilege reflects an unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt that defined the operation of the

Star Chamber, wherein authorities forced suspects to choose between revealing incriminating private thoughts or forsaking their oath by committing perjury. *Muniz*, 496 U.S. at 596. In his dissent to the Court's opinion in *Griffin*, Justice Stewart described the process as being unquestionably brutal:

> When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

Griffin, 380 U.S. at 620 (Stewart, J. dissenting). Indeed, the longstanding common-law principle, *nemo tenetur seipsem prodere* or "no one is bound to betray himself," was thought to ban only testimony forced by compulsory oath or physical torture, not voluntary, unsworn testimony. *See Mitchell v. United States*, 526 U.S. 314, 332-33 (1999) (Scalia, J., dissenting) (citing T. Barlow, The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate 189-190 (1745)). From this history, the privilege was designed to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullmann*, 350 U.S. at 428.

A. The possibility of adverse inferences during trial from the evidentiary use of pre-trial silence does not constitute compulsion under the Fifth Amendment, and neither the history of the Fifth Amendment nor the Court's precedent justifies the exclusion of such voluntarily obtained evidence.

Historically, the possible use at trial of a defendant's pre-trial silence was not equated with the type of coercive governmental conduct prohibited by the Fifth Amendment. Pretrial procedure in colonial America was governed by the Marian Committal Statute, which provided that justices of the peace would examine prisoners prior to trial and secure a statement from the defendant. *Mitchell*, 526 U.S. at 333 (Scalia, J., dissenting). The justice of the peace would later testify at trial regarding the contents of the statement, and if the defendant refused to speak, that would have been reported to the jury as well. *Id.* (citing Langbein, The Privilege and Common Law Criminal Procedure, in The Privilege Against Self-Incrimination 82, 92 (Helmholz et. al. eds. 1997)). And even after the privilege against compelled self-incrimination was ratified in the Fifth Amendment, justices of the peace continued pre-trial questioning of suspects whose silence continued to be introduced against them at trial. *See, e.g.*, *id.* 526 U.S. at 334 (citing Fourth Report of the Commissioners on Practice and Pleadings in New York – Code of Criminal Procedure xxviii (1849)). Consistent with this history, the Court has held that a suspect's non-custodial

statements are admissible because non-custodial questioning is not inherently coercive. *Berkemer*, 468 U.S. at 442 (holding that statements made to police prior to arrest were admissible).

Notably, *Miranda* held only that custodial interrogation is presumptively coercive, and the reading of the *Miranda* warnings removes the possibility of compulsion. While the Court noted John Lilburne's trial as the "critical historical event" shedding light on the origins and evolution of the Fifth Amendment, it nevertheless fashioned its holding to address the potential for compulsion rather than compulsion under traditional terms. *Miranda*, 384 U.S. at 459-61. The Court reasoned that the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. *Id.*, 384 U.S. at 455. However, even in the context of incommunicado, police-dominated, custodial interrogation, the reading of the *Miranda* warnings is sufficient to dispel the compulsion. As the Court noted in *Miranda*, "without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement *after the privilege has been once invoked.*" *Id.*, 384 U.S. at 474 (emphasis added). It is only when police fail to adequately advise a suspect of his rights, or when they refuse to honor a clear assertion of the privilege against compelled self-incrimination, that custodial interrogation becomes inherently coercive.

Yet, the Court has carefully limited the holding of *Miranda* and its presumption of coercion to custodial

interrogation. For example, the Court long ago upheld the admission of evidence of pre-arrest flight as substantive evidence. *See Alberty v. United States*, 162 U.S. 499, 509-10 (1896). And where a defendant is not deprived of his freedom of action in any significant way, law enforcement questioning is not coercive even when it occurs in a station house. *Mathiason*, 429 U.S. at 495. The Court has held that there is no official compulsion to respond even where a suspect's freedom of action is restricted during a temporary detention. *Berkemer*, 468 U.S. at 439-40.

Additionally, the Court rejected the argument that *Miranda* should be extended to cover interrogation in non-custodial circumstances even after a police investigation has focused on the suspect. *Beckwith v. United States*, 425 U.S. 341, 347 (1976). The Court stated that *Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar "nature and setting of . . . in-custody interrogation." *Id.*, 425 U.S. at 346. "In subsequent decisions, the Court specifically stressed that it was the Custodial nature of the interrogation which triggered the necessity for adherence to the specific requirements of its Miranda holding." *Id.*, 425 U.S. at 346 (citing *Orozco v. Texas*, 394 U.S. 324 (1969); *Mathis v. United States*, 391 U.S. 1 (1968)).

The Court has even held that police questioning in a prison environment is not inherently coercive. *Howes v. Fields*, 132 S.Ct. 1181, 1192 (2012). According to the Court, the prison environment is not inherently coercive because "a prisoner, unlike a person

who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release." *Id.*, 132 S.Ct. at 1191. The same holds true in this case where Salinas was not in custody and free to leave during police questioning. Unlike a person in custody, Salinas was not pressured to speak by the hope that, after doing so, he would be allowed to leave and go home. *Id.*

Most importantly, the Court has already determined that the possibility of adverse inferences from the use of pre-trial silence in a subsequent trial does not amount to a compulsion to speak prior to trial under the Fifth Amendment. *Jenkins*, 447 U.S. at 236. In *Jenkins*, the defendant was charged with murdering a man he claimed had robbed his sister and her boyfriend. *Id.*, 447 U.S. at 232. At trial, Jenkins testified that he acted in self-defense, and the prosecution impeached him with the fact that he had never told that story to police. *Id.*, 447 U.S. at 233. The Court distinguished the situation from that present in *Griffin* by noting that Jenkins had not asserted his right to remain silent, he voluntarily testified. *Id.*, 447 U.S. at 235.

The same is true in this case. Salinas did not assert the privilege against compelled self-incrimination; he voluntarily spoke with police. *See Berghuis*, 130 S.Ct. at 2260. In fact, the situation in *Jenkins* was arguably more coercive than the circumstances of this case because the prosecution drew adverse inferences at trial from Jenkins's total refusal to talk to police. *Jenkins*, 447 U.S. at 234. But in

this case, Salinas voluntarily agreed to go to the police station to answer police questions, and he continued answering questions after Elliott had asked him about the shotgun shells found at the scene of the crime.

Contrary to Salinas's contentions, *Jenkins* rejected the argument that the possibility of drawing adverse inferences during trial from the use of a defendant's pre-trial silence might compel a defendant to talk to police prior to trial. *Id.*, 447 U.S. at 236-38. According to the Court, "It can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him. But the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Id.*, 447 U.S. at 236 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)) (citing *Corbitt v. New Jersey*, 439 U.S. 212, 218 n.8 (1978)). The Court noted in *Jenkins* that "the Fifth Amendment guarantees the accused the right to remain silent during his criminal trial and prevents the prosecution from commenting on the silence of a defendant who asserts the right." *Jenkins*, 447 U.S. at 234 (citing *Griffin*, 380 U.S. at 614). Relying upon *Raffel v. United States*, the Court rejected the idea that the possibility of impeachment by prior silence placed an impermissible burden upon the exercise of Fifth Amendment rights. *Jenkins*, 447 U.S. at 236-37; *see also Raffel v. United States*, 271 U.S. 494, 499 (1926).

Just like a defendant who chooses to testify at trial, Salinas presumably had already weighed the possibility that his responses could be used against him at trial when he voluntarily agreed to the non-custodial interview. The fact that his selective, transitory silence could possibly be brought up later in a trial pursuant to a discussion of his entire interview provided no more coercion to speak with police than the possibility of wide-open cross-examination does to a defendant who voluntarily takes the witness stand. *Raffel*, 271 U.S. at 499 ("We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.") The potential for use at a possible trial subsequent to his voluntary decision to speak with police did nothing to fetter the exercise of Salinas's free will. *See Malloy v. Hogan*, 378 U.S. 1, 8 (1964) ("[T]he Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty[ ].").

What *Jenkins* makes obvious is that the choice at issue in both that case and *Griffin* was the decision to testify at trial, not the decision to speak with police prior to trial. *Griffin* held that a trial court's instruction drawing adverse inferences from a defendant's refusal to testify along with a prosecutor's argument to that effect amounted to a penalty upon the exercise of the right to refuse to testify. *Griffin*, 380 U.S. at

614. But in *Jenkins* the possibility of impeachment with pre-arrest silence at trial did not impose an impermissible burden on the decision to testify. *Jenkins*, 447 U.S. at 236-37. The possible use at trial of pre-arrest silence would not coerce a defendant to speak to police prior to trial. *Jenkins*, 447 U.S. at 236, 238.

Providing greater protection to Salinas's silence than his statements has the same potential to distort the truth-finding function as testifying at trial without impeachment would. It would still, as Justice Kennedy observed, "make the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell." *Mitchell*, 526 U.S. at 322 (quoting *Brown v. United States*, 356 U.S. 148, 156 (1958)). A contrary decision would allow defendants to create exculpatory evidence while immunizing themselves from potentially inculpatory questioning just as if the defendant sought to limit the scope of his cross-examination on the witness stand.

While introduction into evidence of an affirmative assertion of the privilege against self-incrimination may raise due process concerns, the use of a defendant's evasive and non-responsive answers does not. *Cf. Anderson v. Charles*, 447 U.S. 404, 409 (1980) (noting that while inconsistent statements that omit facts can be considered silence, the use of such post-arrest silence did not violate due process). Therefore, the possibility of adverse inferences during

trial from the evidentiary use of his pre-trial silence could not have compelled Salinas to be a witness against himself in violation of the Fifth Amendment.

B. The voluntary, non-custodial questioning environment in this case was not inherently coercive, and therefore did not implicate the Fifth Amendment.

The Court has held that certain situations are so inherently coercive that compulsion under the Fifth Amendment will not merely be presumed but will be conclusively and irrebutably established. Thus, under *Miranda*, if a defendant confesses to a crime as a result of custodial interrogation and without the waiver of *Miranda* rights, his Fifth Amendment privilege against compelled self-incrimination has been violated regardless of whether that particular defendant felt compelled or whether additional facts show that a reasonable person in the suspect's position would not have felt compelled. *See Miranda*, 384 U.S. at 468, 471-72 ("[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. . . . No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.").

Likewise, if a person is given a choice to either forfeit his job or to incriminate himself, his decision to incriminate himself has been automatically compelled regardless of whether he actually felt compelled to

talk or whether a rational person in his particular situation would have felt so compelled. *See Garrity*, 385 U.S. at 497 ("That practice, like interrogation practices we reviewed in *Miranda*[ ], is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'").

One justification for the conclusive-rule approach found in *Miranda* is that it avoids burdening police with the task of anticipating each suspect's idiosyncrasies and divining how those particular traits affect that suspect's subjective state of mind. *Berkemer*, 468 U.S. at 430-431. The efficacy of such a conclusive rule, however, must be balanced against the "legitimacy of the challenged governmental practice" as well as against the truth-determining function of the trial. *See Jenkins*, 447 U.S. at 238; *see also Brown v. U.S.*, 356 U.S. at 156 ("The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.").

But the Court has never created a conclusive rule stating that a non-custodial police interview is so inherently coercive that no amount of circumstantial evidence can overcome the presumption of compulsion, and such a situation does not deserve the blanket protection of a conclusive rule such as *Miranda*. Whether or not compulsion under the Self-incrimination Clause can exist prior to custody, it is substantially less likely that a reasonable person

would feel compelled to incriminate himself under such circumstances. *See, e.g., Howes*, 132 S.Ct. at 1189 ("As used in our *Miranda* case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion."); *Miranda*, 384 U.S. at 478 ("Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today"); *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring) ("When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment.").

Salinas relies upon language from inherent coercion cases – which incorporated a clear assertion of the privilege after a defendant had a legal obligation to speak – in order to suggest that the voluntary, non-custodial police questioning environment in this case was equally coercive. Pet. Br. at 15-16, 26-27; *see also Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964); (finding a violation of the Fifth Amendment when witnesses asserted their privilege against compelled self-incrimination and were held in civil and criminal contempt); *Watkins v. United States*, 354 U.S. 178 (1957) (holding it a violation when Watkins was forced through subpoena to appear as a witness before the Subcommittee of the Committee on "Un-American Activities" of the House of Representatives and later indicted for criminal contempt when he refused to answer questions regarding the Communist Party); *Malloy*, 378 U.S.

at 3 (holding that Malloy could invoke the Fifth Amendment privilege when he was ordered to testify before a court-appointed referee conducting an inquiry into alleged gambling, was held in contempt, and sent to prison for refusing to answer questions); *Marchetti v. United States*, 390 U.S. 39 (1968) (finding a violation when a bookie was statutorily required to register with the IRS that he was engaging in the illegal activity of accepting wagers and was criminally prosecuted when he asserted his privilege against compelled self-incrimination); *Garrity*, 385 U.S. at 494 (holding that police officers' statements were "compelled" and, therefore, inadmissible against them because the officers' employment would have been terminated had they remained silent).

While none of these consequences for the assertion of the privilege against compelled self-incrimination were as brutal as being pilloried like John Lilburne for his refusal to swear the Star Chamber oath, the Court regarded them as a modern equivalent because they placed a condition upon the assertion of the privilege. In each of these cases, the individual was forced by law to provide information, and the refusal to do so gave rise to an automatic punishment enshrined in law and independent of the initial inquiry. *See also Spevack v. Klein*, 385 U.S. 511, 516 (1967) (invalidating order disbarring attorney based upon his failure to comply with subpoena *duces tecum* for financial records where attorney's refusal to respond was premised upon his clear assertion of the privilege against compelled self-incrimination); *Boyd v. United States*, 116 U.S. 616

(1886) (holding that court order during trial requiring the production of invoices from the claimants in criminal forfeiture action violated the Fifth Amendment).

Salinas, however, faced no such compulsion. He was not forced by law to provide information to the police. Neither his freedom of movement nor his freedom to terminate the interview were restricted in any way. And there was no automatic, independent penalty placed upon his assertion of the privilege against compelled self-incrimination. The voluntary, non-custodial police questioning in this case was simply not inherently coercive, and therefore Salinas's responses were not compelled under the Fifth Amendment absent an invocation of the privilege against self-incrimination.

C. *Griffin v. California* applies only to a refusal to testify at trial and only to comments by the judge or prosecutor, neither of which is at issue in this case.

The most significant expansion of this line of cases came in *Griffin v. California* where the Court held for the first time that the drawing of an adverse inference from a defendant's reliance upon his right to refuse to testify at his trial also amounted to a penalty upon the clear assertion of the privilege. *Griffin*, 380 U.S. at 609. There, Eddie Griffin dragged Essie Mae Hodson into an alley and brutally raped her, leaving her to die. *People v. Griffin*, 383 P.2d 432,

434-35 (Cal. 1963), *rev'd*, 380 U.S. 609 (1965). Griffin did not testify at the resulting murder trial, but the trial judge instructed the jury according to a California statute that "among the inferences that may be reasonably drawn [from the defendant's refusal to testify] those unfavorable to the defendant are the more probable." *Griffin*, 380 U.S. at 610. Additionally, the prosecutor argued, "These things he had not seen fit to take the stand and deny or explain." *Id.*, 380 U.S. at 611. According to the Court, the trial court's instruction was "a penalty imposed by courts for exercising a constitutional privilege" that "[cut] down on the privilege by making its assertion costly." *Id.*, 380 U.S. at 614.

The Court took no issue with the jury drawing an adverse inference on its own from the defendant's refusal to testify, it only invalidated California's statutory scheme that required the trial court to instruct the jury to draw the adverse inference and allowed the prosecution to argue it. *Id.*, 380 U.S. at 614 ("What the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.") It was not until *Carter v. Kentucky*, that the Court took the extra step of requiring a no-adverse-inference instruction. *Carter v. Kentucky*, 450 U.S. 288, 301 (1981) ("The *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify.").

But putting aside *Griffin's* extension of prior law, the focus of the case was not on Griffin's individual decision to take the witness stand, it addressed an environment that was inherently coercive at the time of Griffin's decision not to testify. As in the other penalty cases, Griffin was legally obligated to participate in the proceeding, or suffer an immediate consequence. The Court apparently equated the statutory authority of a trial court and prosecutor to draw adverse inferences from the refusal to testify with the authority to hold an individual in contempt for refusing to answer questions.

1. *Griffin* was fundamentally based on the presumption of innocence, which is a trial right.

Griffin was designed to be limited to the context of trial. The Court reversed Griffin's conviction based on *Wilson v. United States*, which had enforced a federal statute that prevented "any presumption against [a criminal defendant]" who failed to testify. *Griffin*, 380 U.S. at 613-14 (citing *Wilson v. United States*, 149 U.S. 60, 66 (1893)). The Court did not hold that the trial court in *Griffin* violated the federal statute but rather that the purpose of the federal statute reflected "the spirit of the Self-Incrimination Clause[ ]." *Griffin*, 380 U.S. at 613-14. *Wilson* itself, however, was not based on the Fifth Amendment; it was based on "the presumption of innocence." *See Griffin*, 380 U.S. at 613, quoting *Wilson*, 149 U.S. at 66 ("the act was framed with a due regard also to

those who might prefer to rely upon the presumption of innocence which the law gives to every one."). The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. *See Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

The *Griffin* Court essentially stated that the Self-Incrimination Clause was framed to allow people to rely on the presumption of innocence. *See Griffin*, 380 U.S. at 613. In fact, it concluded that, "If the words 'fifth Amendment' are substituted for 'act' and for 'statute,'" in the *Wilson* opinion, "the spirit of the Self-Incrimination Clause is reflected." *Griffin*, 380 U.S. at 613-614. Literally making that substitution renders: "[the Fifth Amendment] was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses." *See id.*, 380 U.S. at 613 (quoting *Wilson*, 149 U.S. at 66). Such substitution would further provide that "[The Fifth Amendment] declares that the failure of a defendant in a criminal action to request to be a witness shall not create any presumption against him." *See id.*, 380 U.S. at 613 (quoting *Wilson*, 149 U.S. at 66). Thus, for the purposes of *Griffin*, the Fifth Amendment extends only so far as the presumption of innocence announced in *Wilson*.

The presumption of innocence, however, is solely a trial right and has "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Bell v. Wolfish*, 441 U.S. 520, 533 (1979). It is a doctrine that allocates the burden of proof in criminal trials. *Id.* It also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. *Id.* (citing *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *Estelle v. Williams*, 425 U.S. 501 (1976); *In re Winship*, 397 U.S. 358 (1970)). Thus, it simply defies logic to extend *Griffin* beyond the trial context upon which the presumption of innocence was based.

Salinas may argue that the presumption of innocence does not apply to the punishment phase of trial, yet this Court has extended *Griffin* to that phase in *Mitchell*. *See Mitchell*, 526 U.S. at 325 ("We reject the position that either petitioner's guilty plea or her statements at the plea colloquy functioned as a waiver of her right to remain silent at sentencing."); *Herrera v. Collins*, 506 U.S. 390, 399 (1993) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."). Of course, many on this Court resisted the move to extend *Griffin* beyond the guilt stage of trial. *See Mitchell*, 526 U.S. at 336 (Scalia, J., dissenting), and 526 U.S. at 342 (Thomas,

J., dissenting). But *Mitchell* need not be overruled in order to hold the *Griffin* line in the present case because the language of *Griffin* was broader than the guilt stage of trial and extended to the entire trial. In the context of *Griffin*, the presumption of innocence must be understood in the language from which it was born. *Wilson* and *Griffin* were not explicitly restricted to the guilt stage of trial, but simply provided "that the failure of a defendant in a *criminal action* to request to be a witness shall not create any presumption against him." *Griffin*, 380 U.S. at 613 (emphasis added). Thus, *Griffin*'s language extended the concept to all stages of trial, but not beyond those stages.

Salinas claims that "the *Griffin* rule applies to a defendant's silence not only at trial [. . but also outside of the courtroom proceedings as well." Pet. Br. 13. Although *Griffin* has been extended by the Court to cover other fact situations, it has been in the context of some stage of a trial. *See Carter*, 450 U.S. at 288 (extending *Griffin* to require that a criminal trial judge give a "no-adverse-inference" jury instruction when requested by a defendant to do so); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (citing *Griffin*'s "assertion costly" language in striking down law requiring defendant to testify first); *Mitchell*, 526 U.S. at 325 (extending *Griffin* to penalty phase of trial).

Furthermore, while there was a substantial amount of dicta in *Griffin* dealing with the penalties and the costs of exercising a constitutional privilege,

the *Griffin* rule itself was that neither the prosecution nor the trial court could comment adversely on the defendant's failure to testify at the criminal proceeding. *Griffin*, 380 U.S. at 611, 615. By its very nature, *Griffin* does not apply outside of courtroom proceedings because it is based on the failure to testify at that proceeding.

As sole support for his proposition that "the *Griffin* rule applies . . . outside of the courtroom proceedings," Salinas quotes footnote 37 of *Miranda*. Pet. Br. 13-14. Footnote 37 states that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police *custodial* interrogation." *Miranda*, 384 U.S. at 468 n.37 (emphasis added). But Salinas has conceded that there was no custodial interrogation in this case. Pet. Br. 2. Thus, even if *Griffin*, for the sake of argument, could be extended to a pre-trial, custodial interrogation, it does not support the proposition that *Griffin* has been extended to voluntary, non-custodial police questioning.

Furthermore, footnote 37 cites *Griffin*, *Malloy*, *Bram v. United States*, and two law review articles with a "Cf." cite. *Miranda*, 384 U.S. at 468 n.37 (citing *Griffin*, 380 U.S. at 609; *Malloy*, 378 U.S. at 8; *Bram v. United States*, 168 U.S. 532 (1897)). Such a vague citation cannot mean that the Court meant to extend every rule in those authorities to apply outside of the courtroom. *Bram* dealt with a pretrial confession, so perhaps the Court cited *Bram* in support of the "custodial interrogation" portion of the

footnote while it cited *Griffin* for the purposes of the "stood mute" portion of that footnote. *See id.* (citing *Griffin*, 380 U.S. at 609; *Bram*, 168 U.S. at 532). In any event, footnote 37 cannot confidently be labeled an example of the Court extending *Griffin* outside of a courtroom proceeding.

Finally, footnote 37 was predicated on the warning requirements of *Miranda*, so a comment on muteness as mentioned in the footnote would have been a violation of due process rather than an extension of the *Griffin* rule. *See Doyle*, 426 U.S. at 610. Thus, contrary to Salinas's claims, the Court has not previously extended *Griffin* outside of the context of a courtroom. While some broad dicta in *Griffin* might seem to justify such an extension, doing so would be entirely inconsistent with the facts that the holding was based upon, as well as the opinion's rationale.

2. Unlike the instruction and argument in *Griffin*, the mere admission into evidence of Salinas's selective, transitory silence did not mandate an adverse inference by the jury.

Whatever the merits of reframing *Griffin*, this case is not *Griffin*. The Fifth Amendment violation in *Griffin* was based on the joint effect of the trial court's instruction and the comment by the prosecutor, both of which invited the jury to make an adverse inference from Griffin's refusal to testify at trial. *Griffin*, 380 U.S. at 610.

Salinas's trial objection was solely to the evidence that he "did not answer" one question during his interview with Elliott. J.A. 15-18. That was the only issue raised on appeal in the Texas appellate courts, and the Texas Court of Criminal Appeals made no mention of the prosecutor's closing argument to the jury that Salinas "wouldn't answer that question." *Compare* Pet. App. 2a *with* 7.RR.171-73. Indeed, the Texas Court of Criminal Appeals framed the issue as whether "the trial court erred in *admitting evidence* of his pre-arrest, pre-*Miranda* silence." *Id.* (emphasis added).[4] Thus, the issue before the Court is not whether the trial prosecutor violated Salinas's privilege by asking the jury to draw an adverse inference during closing argument but whether the trial prosecutor violated Salinas's privilege by introducing evidence of his selective, transitory silence during his interview with Elliott.

Griffin cannot be extended to apply to the current situation where the evidence of Salinas's selective, transitory silence was not in itself adverse. For example, in *Lakeside v. Oregon*, the Court held that

---

[4] The Texas Court of Criminal Appeals also stated that "pre-arrest, pre-Miranda silence is not protected by the Fifth Amendment right against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies." Pet. App. 6a. But the absence of any discussion in that opinion of the prosecutor's closing argument suggests that the Court of Criminal Appeals treated the introduction of evidence of Salinas's silence as itself a comment on his silence. Pet. App. 6a.

Griffin did not apply because "a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of his privilege not to testify is 'comment' of an entirely different order." *Lakeside v. Oregon*, 435 U.S. 333, 339 (1978) (emphasis omitted); *see also Carter*, 450 U.S. at 298 (analyzing *Lakeside*).

Unlike the comments in *Griffin*, which explicitly directed the jury to infer guilt as a result of Griffin's refusal to testify, the mere introduction of the selective, transitory silence in the present case did not necessarily call for an adverse inference against Salinas. *See Griffin*, 380 U.S. at 614 ("What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."). The prosecutor in this case suggested that Salinas's lack of a verbal response was due to the fact that back in 1993, "before CSI was on TV," Salinas did not know that ballistics testing could be done and that Salinas was wondering whether such evidence could connect him to the crime. 7.RR.171, 173. But Salinas could also have been wondering whether such scientific methods were reliable and whether it would falsely connect him to the crime. Or he could have been wondering whether someone else with access to the gun could have committed the murder, in which case the shotgun would match the shells. Thus, the evidence itself was open to interpretation, it did not mandate an adverse inference, and *Griffin* does not apply to its mere admission.

3. Salinas's selective, transitory silence during a voluntary, non-custodial interview does not equate to *Griffin's* compulsion to stand trial.

Griffin was born out of a trial, with all the compulsive elements that attend an official proceeding. *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 473 (1976) (recognizing the "inherent psychological pressure to respond at trial to unfavorable evidence."); *United States v. Hvass*, 355 U.S. 570, 575 n.4 (1958) (noting that a witness is required to take an oath in order to testify).

Griffin was required to stand trial, but Salinas voluntarily went to the police station to talk to the police. J.A. 14; 5.RR.54. As the Court stated, "[t]here is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make." *Miranda*, 384 U.S. at 478 (footnote omitted). Furthermore, "[v]olunteered statements of any kind are not barred by the Fifth Amendment[.]" *Id.*; *see also Rhode Island v. Innis*, 446 U.S. 291, 299-300 (1980) (reviewing *Miranda* to address interplay between interrogation and the need for prophylactic warnings). Salinas claims that he "had no option when questioned by the police but to become a witness against himself." Pet. Br. 17. But this claim ignores the crucial step where Salinas voluntarily went to the police station to talk to the police, thereby

voluntarily choosing to make himself a witness. That crucial element distinguishes this case from *Griffin*.

Another element of compulsion present in *Griffin*, yet absent here, is that if Griffin wanted to offer evidence to rebut the prosecution's case, he was required to take an oath and be subjected to cross-examination by the prosecution. *See Hvass*, 355 U.S. at 575 n.4; *Brown v. United States*, 356 U.S. at 155-156 ("He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute."). Salinas, on the other hand, was not required to take an oath and not required to answer questions under cross-examination. Indeed, his failure to answer the question at issue in this appeal proves the distinction: if Griffin had testified at trial, he would have been ordered by the court to answer questions on cross-examination, whereas Salinas was allowed to walk out of the police station without verbally responding to every question. The evidence showed that Salinas voluntarily went downtown to talk with the police officers, that he was not under arrest for murder, and that he was allowed to leave without murder charges being filed against him. J.A. 14; 5.RR.54. Therefore, the compulsory elements of a trial were not present in this case, and *Griffin* should not be stretched to encompass it. *See, e.g., Baxter*, 425 U.S. at 317.

Not only was the compulsory nature absent in the present case, Salinas took no affirmative steps to invoke the privilege against compelled self-incrimination. Unlike Griffin, who necessarily rested

his case at the guilt stage without taking the stand, Salinas made no unequivocal act demonstrating his assertion of his privilege against compelled self-incrimination. *See Griffin*, 380 U.S. at 609. The privilege against compelled self-incrimination may not be relied upon unless it is invoked in a timely fashion. *Garner*, 424 U.S. at 653-55; *see also Berghuis*, 130 S.Ct. at 2260. Thus, the present case lacks both the compulsion and the invocation that were necessarily present in the trial setting of *Griffin*.

4. The Court has already chosen not to extend *Griffin* to the context of evidentiary admissibility.

In dealing with the admissibility of evidence obtained prior to trial, the Court has applied general Fifth Amendment principles rather than the rule announced in *Griffin*. *Schmerber*, 384 U.S. at 765 n.9. While the primary focus of *Schmerber* was the admission of blood test results, Schmerber had also made a Fifth Amendment argument regarding the prosecution's use of his refusal to submit to a "breathalyzer" test. *Schmerber*, 384 U.S. at 765 n.9. The Court rejected Schmerber's invitation to extend *Griffin* to that circumstance, choosing to apply the general Fifth Amendment principles set out in *Miranda* instead. *Id.*

When the Court subsequently considered whether the use of a defendant's pre-trial refusal to submit to a blood-alcohol test at trial violated the Fifth Amendment, it did not apply *Griffin*. *South Dakota v.*

Neville, 459 U.S. 553, 560, 563 (1983). Doubtless, Salinas will argue that *Neville* is distinguishable because in this case the State lacked the ability to compel Salinas's answers in the same way that police could compel the taking of a blood test in *Neville*. But that argument overlooks the Court's holding in *Neville* that the introduction of a defendant's refusal was not compelled merely because it could have been used against him at trial. *Id.*, 459 U.S. at 564. Though the Court could have extended *Griffin*'s rationale to prohibit the admission of the evidence, the Court did not do so because it first determined that the refusal was not compelled under the Fifth Amendment. *Id.*

Additionally, while the Court held in *Doyle v. Ohio* that a defendant's refusal to speak with the police after being read his *Miranda* warnings could not be used for impeachment purposes, the Court decided that case without reference to the rationale announced in *Griffin*. *Doyle*, 426 U.S. at 618-19. In *Doyle*, the Court reasoned that the use of a defendant's refusal to speak after he had been advised that he could remain silent was fundamentally unfair under the Due Process Clause of the Fourteenth Amendment. *Id.*, 426 U.S. at 619; *cf. Fletcher*, 455 U.S. at 607 (holding that it is the use of silence after the assurances embodied in *Miranda* that violates due process, not the use of pre-*Miranda* silence at trial).

The Court has never held that a defendant's pre-arrest silence, in the absence of an invocation of the

privilege against compelled self-incrimination, is somehow compelled because it could potentially be used at trial. And rather than extend *Griffin* to cover the admissibility of evidence obtained prior to trial, the Court has applied general Fifth Amendment principles to the admission of such evidence by considering whether the evidence in question was compelled, testimonial, and incriminating. Because Salinas's selective, transitory silence during a voluntary, non-custodial interview was none of these things, the admission of the evidence did not violate the Fifth Amendment.

III. Any error in the admission of Salinas's selective, transitory silence during a voluntary, non-custodial police interview was harmless beyond a reasonable doubt.

Even if the admission into evidence of Salinas's selective, transitory silence violated the Fifth Amendment privilege against compelled self-incrimination, any error in the admission of such evidence was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967).

Testimony that Salinas "did not answer" Elliott's question was quite brief. Elliott testified that he asked Salinas "if the shotgun in question here would match the shells recovered at the scene of the murder?" J.A. 17. When asked, "And what was his answer?" Elliott gave a four word reply, "He did not answer." J.A. 17.

Salinas did, in fact, answer Elliott's question by his non-verbal conduct. Elliott testified, without a Fifth Amendment objection by Salinas, as to Salinas's non-verbal response that he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." J.A. 18.

Moreover, there was overwhelming evidence of Salinas's guilt. Martha Trevino Alexander awoke on the morning of December 18, 1992, to the sound of gunshots, a scream, and more gunshots. 4.RR.73, 138-139. She looked out the window of her downstairs apartment and saw the back of a man in his twenties; he was wearing a white hat, dark pants, and a long tan coat that appeared bulky on the right side. 4.RR.73, 140-146, 157-159. The man came halfway down the stairs, ran toward the street, and entered a nice, dark Z28 Camaro or Trans Am, which fled the scene. 4.RR.73, 140-146, 157-159. The description of the vehicle observed at the scene of the murders matched vehicles owned by Salinas and his family. 4.RR.73, 146-147; 5.RR.19, 22, 29. The description of only one man being observed running from the scene matched Salinas's admission to Cuellar that he, alone, had killed Johnny and Hector. 4.RR.73, 140-144.

Officers recovered six fired 12-gauge No. 6 Remington Peter shotgun shells from the scene. 5.RR.15. Ballistics analysis revealed all six fired shotgun shells had been fired in the Winchester Defender shotgun recovered from Salinas's residence.

4.RR.96, 103-104; 5.RR.49-50, 149, 156, 181-182, 200-204, 219-221.

Salinas's good friend, John Damien Cuellar, testified that Salinas had left Hector's apartment the night before the murders but had stated that he planned to go back to the apartment. 4.RR.168, 174. Salinas, whom he knew to carry a 12-gauge chrome pistol grip shotgun, admitted just two days after the murders that he had returned to Hector's apartment in a Camaro and he, alone, had killed Johnny and Hector. 4.RR.171, 178-185, 189, 191, 224-225. Shortly thereafter, Cuellar told Salinas that he had decided to tell the police what Salinas had told him, and that Salinas has to do what he has to do – whether it be turning himself in or running. 4.RR.190-91.

Knowing that the police had recovered the murder weapon from his residence and that he was a suspect in a double murder, Salinas absconded and was a fugitive for over fourteen years. 5.RR.59-63. Officers finally located Salinas in jail, after he had been arrested under a different name and different date of birth. 5.RR.63-65.

Clearly, the record as whole demonstrates beyond a reasonable doubt that the admission of evidence that Salinas "did not answer" Elliott's question during a voluntary, non-custodial police interview did not contribute to Salinas's conviction.

CONCLUSION

For these reasons, the Court should affirm the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted.

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Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari
to the Texas Court of Criminal Appeals

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REPLY BRIEF FOR PETITIONER

The core purpose of the Self-Incrimination Clause has always been to forbid law enforcement in investigative settings from compelling suspects to be witnesses against themselves (and then later using such evidence at trial). *See, e.g.*, *Michigan v. Tucker*, 417 U.S. 433, 440-45 (1974). In other words, the Clause guarantees "the right of a person to remain silent" in the face of investigative inquiries "unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

The unconstitutional compulsion in this case is straightforward: Under the rule adopted by the Texas Court of Criminal Appeals, when the police asked Salinas what a ballistics analysis would show, he had no way to avoid supplying evidence that could be used against him. If he answered the question, the prosecution could use the answer he gave against him; if he declined to answer, the State likewise could use his silence against him. For all of the reasons this Court held in *Griffin v. California*, 380 U.S. 609, 615 (1965), and *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966), that defendants may not be put in such a double bind during trial or custodial interrogations, the Self-Incrimination Clause should not tolerate putting them in this situation during voluntary interviews either.

The State nevertheless argues that the *Griffin* rule should be limited to the trial context (refusing even to accept this Court's explicit holding in *Miranda* that it applies to custodial interrogations). But none of the State's contentions is logical or persuasive. In fact, the State seems to realize as

much, for it spends the majority of its brief offering a hodgepodge of alternative possibilities for affirming the judgment below. Yet none of those arguments withstands scrutiny either.

In contrast to the State and the Texas Court of Criminal Appeals, the Solicitor General accepts that the *Griffin* rule generally applies in the context of noncustodial police questioning. And he agrees with Salinas that *Griffin* applies when a person declines to participate in such an interview or expressly invokes the Fifth Amendment while refusing to answer any specific questions during an interview. U.S. Br. 22, 28 n.5. But the Solicitor General argues that *Griffin* does not apply when, as here, a person being interviewed refuses to answer certain questions without expressly announcing that he is relying on the Fifth Amendment. This gerrymandered attempt to salvage the judgment below has no more foundation in law or facts than the State's various alternatives. Worse yet, the Solicitor General's proposal would create numerous practical and administrative problems sure to vex police, lawyers, and courts alike.

ARGUMENT

I. The *Griffin* Rule Applies To Silence In The Face Of Pre-Arrest, Pre-*Miranda* Police Questioning.

The State acknowledges that the right against self-incrimination applies in noncustodial settings. *See* Resp. Br. 38-40 (citing cases). Yet the State asks this Court to limit the *Griffin* rule to trial for three reasons. None has merit.

1. The State first argues that the *Griffin* rule should not apply to noncustodial police questioning because an interviewee in this setting suffers no "automatic punishment" if he refuses to answer questions. Resp. Br. 39. But this argument – like the Texas Court of Criminal Appeals' emphasis on the fact that noncustodial interviews do not involve physical and psychological coercion – misunderstands the type of compulsion against which *Griffin* protects. A *Griffin* claim depends neither on physical coercion to speak nor on any automatic punishment for failing to speak. Instead, a *Griffin* claim derives from the witness's inability, if the prosecution can comment on his silence, to avoid providing the government with evidence it can use against him. *See* Petr. Br. 13.

This Court's explanation in *Miranda* that the *Griffin* rule applies to silence after a suspect has been advised of his rights in a custodial setting demonstrates the point. *See Miranda*, 384 U.S. at 468 n.37. When a suspect in custody "st[ands] mute" in the face of accusatory questioning, *id.*, it is entirely unclear whether the government will ever seek to penalize him by using that silence against him at a trial. Yet the suspect is nonetheless compelled to incriminate himself because no matter whether he answers or not, he provides the government with evidence to use against him in his criminal prosecution. So too here.

The State seeks to downplay this holding within *Miranda*, asserting that this Court did not "mean[] to extend" the *Griffin* rule in that case and that the holding is based on due process, not the Fifth Amendment. Resp. Br. 46-47. Neither assertion is accurate. In an opinion as carefully considered as

Miranda, it is safe to assume this Court meant what it said. Indeed, in the years following that decision, numerous state and federal appellate courts reasonably took this Court's application of the *Griffin* rule in the custodial context to be binding law. *See, e.g.*, *United States v. Earl*, 529 F.2d 1145, 1147 (6th Cir. 1976); *United States v. Wick*, 416 F.2d 61, 62 (7th Cir. 1969); *United States v. Yates*, 524 F.2d 1282, 1285 (D.C. Cir. 1975); *Hawk v. State*, 482 S.W.2d 183, 184 (Tex. Crim. App. 1972); *State v. Beck*, 183 N.W.2d 781, 784 (Minn. 1971). This Court also reiterated the holding in *South Dakota v. Neville*, 459 U.S. 553 (1983), explaining that "the right to silence underlying the *Miranda* warnings is one of constitutional dimension." *Id.* at 565 (citing *Miranda*, 384 U.S. at 468 n.37).

It is true that *Miranda*'s application of *Griffin* to custodial interrogation became less important once this Court held in *Doyle v. Ohio*, 426 U.S. 610, 611 (1976), that the Due Process Clause prohibits the prosecution from using post-*Miranda* custodial silence as impeachment evidence. Any rule that bars the introduction of evidence for impeachment purposes *a fortiori* bars it during the prosecution's case-in-chief. Yet nothing about *Doyle* erased *Griffin*'s application to custodial interrogation. *Doyle* rests on due process because the privilege against self-incrimination does not apply once the defendant takes the stand. *See* Petr. Br. 35-36. But where the prosecution seeks to use custodial silence in its case-in-chief, the self-incrimination reasoning in footnote 37 of *Miranda* carries as much precedential vitality as does *Doyle*. *See, e.g.*, *Booton v. Hanauer*, 541 F.2d 296, 298 (1st Cir. 1976).

2. The State next argues that *Griffin* does not apply to noncustodial police questioning because suspects in such circumstances "voluntarily [go] to the police station to talk to the police." Resp. Br. 50. Once again, the State misapprehends the nature of the compulsion at issue here. The compulsion arises not when the police invite the suspect to the station for questioning, but rather in the stationhouse when the police ask the suspect an incriminating question – and the suspect at that moment is unable to avoid becoming a witness against himself if either an answer or his silence can be used against him.

The State's argument also proves far too much. If simply agreeing to begin talking to the police foreclosed any claim of compulsion from arising in the ensuing interview, then *nothing* that happened during the interview – not even threats or the use of physical force – would implicate the Fifth Amendment. Such tactics, of course, represent a different sort of compulsion than is at issue here. But the clear reality that these tactics would be impermissible shows that the pertinent time to ask whether a person has been compelled to be a witness against himself in a noncustodial interview is at the moment the evidence at issue was generated, and not at the time when he agreed to be interviewed.

3. That leaves the State (joined by several states as amici) to contend that *Griffin* should not be extended because the *Griffin* rule does not comport with history. Resp. Br. 29; *see also* Br. of Illinois et al. 9-16. But this Court has already considered and rejected such arguments. In *Mitchell v. United States*, 526 U.S. 314 (1999), this Court held that the *Griffin* rule – regardless of its Founding-era pedigree

– has become "an essential feature of our legal tradition" and should be applied in a principled manner. *Id.* at 330. Indeed, this Court noted that forbidding negative inferences from silence is "of vital importance" to maintaining our modern, accusatorial system of justice. *Id.* at 329; *see also* Petr. Br. 14-16. There is no reason to revisit that debate here.

At any rate, the originalist case against applying *Griffin* here is not as strong as the State would have this Court believe. This Court has noted time and again that the right against self-incrimination "was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago." *Tucker*, 417 U.S. at 440; *see also United States v. Hubbell*, 530 U.S. 27, 34 n.8 (2000); *Ullman v. United States*, 350 U.S. 422, 426-29 (1956); *Brown v. Walker*, 161 U.S. 591, 596-97 (1896). And according to Leonard Levy's Pulitzer Prize-winning historical account, the right that developed to forbid such practices "did permit a refusal to answer" accusatory questioning "without formal prejudice or penalty." Leonard W. Levy, Origins of the Fifth Amendment 313 (1968); *see also* Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre*-Miranda *Silence*, 98 Va. L. Rev. 897 (2012). While the State would prefer that this Court focus on alternative historical practices, *see* Resp. Br. 29, it gives no good reason for abandoning this Court's decades-old understanding of the origins and purpose of the Fifth Amendment.

II. There Is No Reason Specific To The Facts Of This Case To Refrain From Enforcing The *Griffin* Rule.

None of the alternative arguments that the State or the Solicitor General offers in defense of the judgment below withstands scrutiny.

A. Both The Introduction Of Salinas's Silence And The Prosecutorial Comment On It Are At Issue Here.

The State first contends that the prosecutor's argument to the jury that "an innocent person" would have responded to the police officer's question about ballistics is irrelevant because "[t]his case presents the issue of whether the *admission* of, and not *argument* or *comment* concerning, evidence of a defendant's silence during non-custodial police questioning violates the Fifth Amendment." Resp. Br. 13 n.1 (emphasis in original). Not so.

The propriety of the prosecutor's comment is well within the question this Court granted certiorari to decide: "Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights." Pet. i. The petition for certiorari argued that "the prosecution also may not comment on a nontestifying defendant's earlier refusal [to] respond to law enforcement's pre-arrest questioning." Pet. 14; *see also id.* 15-16. And the State never suggested in its BIO that Salinas was disabled from challenging the prosecutorial comments in this case. *See* Sup. Ct. R. 15.2.

Nor would the State have had any basis for doing so. Petitioners seeking review of state court decisions

may raise any federal constitutional issue either "pressed or passed upon" below. *Clark v. Jeter*, 486 U.S. 456, 459-60 (1988). *Both* of those things occurred here. First, Salinas argued in the Texas courts that the prosecution violated the Fifth Amendment when it "used" his silence against him, including when, "in its guilt-innocence summation, [the prosecution] emphasized this silence" and "argued why [it] should be used against him." Salinas's Br. to Tex. Ct. App. 32; *see also* J.A. 3-5. Second, the Texas Court of Criminal Appeals plainly passed on the issue, holding both "that pre-*Miranda* silence is not protected by the Fifth Amendment against self-incrimination," and that "prosecutors may comment on such silence regardless of whether a defendant testifies." Pet. App. 6a.

B. The State Used Salinas's Silence, And Not Some Nonverbal Communication, Against Him.

Sergeant Elliott testified that when he asked Salinas whether the shells found at the victims' apartment would match the shotgun from his house, Salinas "did not answer." Pet. App. 11a. At closing, the prosecution stressed three times that Salinas "wouldn't answer that question." *Id.* 18a-19a. And on appeal, the State maintained that it was permissible to use petitioner's "silence" as substantive evidence of guilt. State's Br. in Tex. Ct. Crim. App. 3, 2012 WL 244956. The Texas Court of Appeals and Court of Criminal Appeals agreed, holding that the Fifth Amendment permitted the State to rely and comment on Salinas's "failure to answer the question" and his "silence." Pet. App. 6a, 23a.

The State now reverses course, asserting that "Salinas was not 'silent'" after all. Resp. Br. 19. Specifically, the State contends that "Salinas physically responded to Elliott's question" about the shotgun shells, and that "this response was admissible as an assertion." *Id.*

This is nonsense. While some nonverbal conduct, such as a shake of the head, can answer an inquiry, *see, e.g.*, *Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966), the State never contended at trial or on appeal that Salinas physically responded to the ballistics question. To the contrary, it told the jury that Salinas "wouldn't answer that question." Pet. App. 18a-19a. The State thus cannot evade the constitutional question raised by its use of Salinas's silence by a "post-hoc [re]characterization" of its evidence and arguments. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1032 (9th Cir. 2001) (en banc).

C. The State Treated Salinas's Silence As Testimonial.

Directly contradicting its "physical response" argument, the State next asserts that Salinas's silence "failed to disclose any incriminating information or relate any incriminating factual assertions." Resp. Br. 22. Thus, according to the State, the prosecution's use of Salinas's silence did not implicate the Fifth Amendment because Salinas's silence was not "testimonial." *Id.* This argument, too, is misguided.

As just indicated, the prosecution characterized Salinas's refusal to answer the officer's question about ballistics as a "very important piece of evidence," J.A. 4, because "an innocent person" would have answered that question, Pet. App. 18a. That

characterization and argument make it clear that the State treated Salinas's silence as testimonial – that is, as disclosing incriminating information, *see Doe v. United States*, 487 U.S. 201, 210 (1988). Indeed, "[w]hatever else it may include," the definition of "testimonial" evidence "encompass[es] *all* responses" to questions that place a person in the cruel "'trilemma' of truth, falsity, or silence." *Pennsylvania v. Muniz*, 496 U.S. 582, 596-97 (1990) (emphasis added). To hold otherwise here, this Court would have to overturn its rulings in *Griffin* and *Miranda* that prosecutorial use of a defendant's silence violates the Fifth Amendment. *See Griffin*, 380 U.S. at 615; *Miranda*, 384 U.S. at 468 n.37.

D. No Express Invocation Was Necessary During The Interview To Preserve Salinas's Ability To Enforce The *Griffin* Rule At Trial.

The Solicitor General concedes that "[w]hen a suspect expressly invokes his Fifth Amendment privilege during a noncustodial interview, that invocation may not be used as substantive evidence against him." U.S. Br. 22. Yet the Solicitor General – advancing an argument that not one of the dozens of lower courts to address the question presented here has ever made – contends that where, as here, a person merely remains silent in response to such police questioning, the person loses the right to invoke *Griffin*'s no-adverse-inference rule at trial. *Id.* 23; *see also* Resp. Br. 14-16 (emphasizing lack of invocation during interview). This proposal misses the mark. There is no reason for requiring suspects who remain silent in the face of noncustodial questioning to formally invoke their privilege against

self-incrimination, and creating such a requirement would create numerous practical and administrative problems.

1. This Court's jurisprudence already establishes that advance invocation is not necessary in order to preserve one's right to rely on the *Griffin* rule. For starters, a person need not expressly announce at trial that he declines to testify for the *Griffin* rule to bar the prosecution from later commenting on his silence. All a defendant need do is "exercis[e]" his right to remain silent and then object if the prosecution attempts to comment on that silence. *Griffin*, 380 U.S. at 614; *see also* U.S. Br. 19-21 & n.3, 23. Likewise, as the Solicitor General is forced to concede (Br. 18), no advance invocation is necessary in the context of custodial questioning. This Court has made clear that a person who "*stood mute or* claimed his privilege in the face of accusation" during a custodial interview may invoke *Griffin* at trial to preclude the prosecution from using that silence against him. *Miranda*, 384 U.S. at 468 n.37 (emphasis added).

Those holdings comport with basic Fifth Amendment principles and apply equally here. The Self-Incrimination Clause prohibits the government from using compelled statements against a defendant "in a criminal case" – that is, at trial. *Chavez v. Martinez*, 538 U.S. 760, 769 (2003) (opinion of Thomas, J.); *see also id.* at 767-69 (collecting authorities on the point). And the requirement that a person invoke the Fifth Amendment "is principally a matter of timing and procedure," designed to ensure that people advise the government in a "timely" manner when they believe it is threatening to tread

on Fifth Amendment rights. *Garner v. United States*, 424 U.S. 648, 665 (1976). Accordingly, it has always sufficed for a person who claims that the police compelled him during investigatory questioning to be a witness against himself to invoke the Fifth Amendment *at trial*, when the prosecution indicates that it wishes to use that evidence against him. *See, e.g.*, *Beecher v. Alabama*, 389 U.S. 35, 37 n.3 (1967) ("no doubt" that invocation was timely made at trial); *Davis v. North Carolina*, 384 U.S. 737, 739-40 (1966) (same). There is no reason to deviate from that simple rule here, which Salinas clearly satisfied. J.A. 4-5, 15.

2. The Solicitor General tries to analogize this case to situations that did *not* involve police questioning, in which this Court has held that persons must invoke the Fifth Amendment *prior to trial* to preserve their rights. *See* U.S. Br. 15-18, 21-30. This Court should ignore this misdirection. Where there is no reason to believe that a witness is trying to avoid incriminating himself, "the general rule," *Garner*, 424 U.S. at 656, is that it is incumbent upon him to "put the Government on notice" that his silence actually raises a Fifth Amendment issue, *Minnesota v. Murphy*, 465 U.S. 420, 428 (1984) (internal quotation marks omitted). But such is obviously not the case where, as here, a suspect is silent during an investigatory interview in which the police are trying to get him to divulge incriminating information.

a. Many of the cases on which the Solicitor General relies involved the question whether a *statement* the defendant had made – and not a defendant's silence – was admissible. *See Murphy*,

465 U.S. 420; *Garner*, 424 U.S. 648; *United States v. Kordel*, 397 U.S. 1 (1970); *United States v. Monia*, 317 U.S. 424 (1943). When a person "chooses to answer" questions in a situation in which he could have remained silent, the government has no way of knowing that the person wished to exercise the privilege against self-incrimination. *Murphy*, 465 U.S. at 429. Accordingly, even "if a witness [is] under compulsion to testify [and] makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner*, 424 U.S. at 654. "[H]is choice [to speak] is considered to be voluntary." *Murphy*, 465 U.S. at 429.

These cases are inapposite because Salinas made no disclosure. He "did not answer" the officer's question at issue. J.A. 17; *see also* Pet. App. 18a-19a ("wouldn't answer"). Accordingly, the police officers were fully on notice that Salinas was exercising, rather than relinquishing, his Fifth Amendment rights.

b. Other cases the Solicitor General cites at least involve witnesses who sought to prevent *silence* from being used against them. *See Roberts v. United States*, 445 U.S. 552 (1980); *Rogers v. United States*, 340 U.S. 367 (1951); *United States v. Sullivan*, 274 U.S. 259 (1927); *Vajtauer v. Comm'r of Immigration*, 273 U.S. 103 (1927). But in those cases, "the Government ha[d] no substantial reason to believe that the requested disclosures [we]re likely to be incriminating." *Roberts*, 445 U.S. at 559. In *Rogers* and *Roberts*, for example, law enforcement personnel sought to require persons to reveal the identities of others suspected of crime. The government in those cases had no reason to believe the Fifth Amendment

was at stake because "a desire to protect *others* from punishment" typically has nothing to with *self*-incrimination. *Rogers*, 340 U.S. at 371 (emphasis added); *see also Sullivan*, 274 U.S. at 264 (request to disclose the amount of one's income on a tax return); *Vajtauer*, 273 U.S. at 107-10 (question in deportation proceedings concerning seemingly non-criminal behavior).

In such situations, witnesses seeking to avoid disclosure on Fifth Amendment grounds must "advise[]" the government of that desire, so that the government may determine then and there "what weight should be given to the contention of the witness that the answer sought will incriminate him." *Vajtauer*, 273 U.S. at 113; *see also Roberts*, 445 U.S. at 560 (contemporaneous invocation required to allow the government to "determine[] whether his claim was legitimate"). If the government decides the contention is meritless, it may press onward and demand answers. Alternatively, if the government deems the invocation proper, it can decide whether to provide the suspect with immunity so it can likewise demand answers. *See, e.g.*, *Kastigar v. United States*, 406 U.S. 441, 462 (1972).

None of this reasoning has purchase in the context of this case. Where the police conduct a custodial interrogation of a suspect, "the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought." *Garner*, 424 U.S. at 657; *see also Marchetti v. United States*, 390 U.S. 39, 50-51 (1968) (no pretrial invocation necessary where government sought specific disclosure it knew "would have served to

incriminate petitioner"). And where, as here, the police conduct a noncustodial interview of a suspect in a murder investigation, the officers are no less aware that they are seeking potentially incriminating information. There is no good reason, therefore, to construe refusals to answer questions as anything other than decisions to exercise the right to remain silent in the classic context of investigative questioning by law enforcement.

c. To be sure, this Court stated in *Murphy* and, more recently, in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), that suspects faced with governmental inquiries (in a probation interview and a custodial interrogation, respectively) seeking incriminating information needed to "assert the privilege" during the questioning in order to protect their Fifth Amendment rights. *Murphy*, 465 U.S. at 429; *see also Berghuis*, 130 S. Ct. at 2256, 2259-60. But in both of those cases, the suspects sought to exclude *statements* they made; in neither case did this Court suggest that an invocation would have been necessary to preserve the ability to invoke the *Griffin* rule at trial with respect to *silence*. To the contrary, the Court in *Murphy* indicated – in language directly parallel to *Griffin* itself, *see* 380 U.S. at 614-15 – that no "penalty" could have been imposed on the suspect for "standing on his right to remain silent." *Murphy*, 465 U.S. at 434-35. Furthermore, as noted above, this Court has already made clear that no contemporaneous invocation is necessary during custodial interrogation to preserve the defendant's

ability to assert the *Griffin* rule at trial. *See supra* at 11.[1]

The Solicitor General tries to distinguish this holding concerning custodial questioning from the situation here on the ground that custodial interrogation is "inherently coercive." U.S. Br. 18. Thus, according to the Solicitor General, the need for a contemporaneous invocation is excused in the custodial context because the interviewee lacks "the ability freely to invoke the right" to remain silent. *Id.* at 24. But this contention confuses the presumption existing before *Miranda* warnings are given with the situation afterward. The whole point of *Miranda* warnings is to "dissipate the compulsion inherent in custodial interrogation" so that a suspect may make "a free and deliberate choice" whether to invoke his rights. *Moran v. Burbine*, 475 U.S. 412, 421, 425 (1986); *accord Berghuis*, 130 S. Ct. at 2260 (quoting *Davis v. United States*, 512 U.S. 452, 460 (1994)). Yet even after such warnings are given – that is to say, after suspects in custody understand that they have the exact same freedom to exercise their right to remain silent as someone in a noncustodial interview – this Court has held that an

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[1] Of course, a contemporaneous invocation of the prophylactic right that *Miranda* confers "to cut off questioning" is necessary to prevent the prosecution from later introducing statements made during custodial interrogation. *Berghuis*, 130 S. Ct. at 2260. But that right is distinct from the constitutional right to remain silent. Salinas makes no claim that the police did anything wrong by continuing to ask him questions or that the trial court erred in allowing the prosecution to introduce any of the statements he made during the interview.

express invocation is unnecessary to preserve the right to rely on *Griffin* at trial. *See supra* at 11.

In the end, this Court's "express invocation" jurisprudence is really about establishing default presumptions. In a setting in which it is "more likely than not," U.S. Br. 26, that a person is *not* seeking to avoid incriminating himself, then it makes sense to require that he expressly invoke the Fifth Amendment to put the government on notice. But where, as here, the police are questioning a suspect as part of a criminal investigation, it is – to say the least – more likely than not that any refusals to answer accusatory questions will flow at least in part from a desire to avoid self-incrimination.

The Solicitor General nevertheless surmises that silence during a noncustodial interview "could reflect surprise, uncertainty at the thrust of the question, or an attempt to settle on the most exculpatory answer." U.S. Br. 8. If a police officer truly believes that to be the case, he may seek to clarify the meaning of any silence on the part of the interviewee. But where the police do not do so – and particularly where, as here, the prosecution argues not that silence reflects surprise or a delay while thought occurred, but rather *guilt* because "an innocent person" would have "answer[ed] that question," Pet. App. 18a-19a – the presumption must be that the interviewee was exercising the privilege against self-incrimination.

3. The Solicitor General's proposal to import an express pretrial invocation requirement into the setting of investigatory police questioning would also raise numerous practical and administrative problems.

a. For one thing, the Solicitor General's proposal would unleash complicated and persistent litigation over what exactly constitutes an "express invocation." As a group of States previously advised this Court, the question presented in this case "affect[s] the day-to-day criminal investigation by state and local police officers." Amicus Br. of Illinois et al. 1, *Bagley v. Combs*, 531 U.S. 1035 (2000) (No. 00-312), 2000 WL 33999298. Indeed, police officers probably conduct thousands of noncustodial investigatory interviews every day. It thus is essential to have predictable and workable rules in this area.

Yet the Solicitor General offers anything but. Borrowing from a 1955 case dealing with a person who referenced the Fifth Amendment in refusing to answer questions before a congressional subcommittee, the Solicitor General defines an "express invocation" as "any language that [the questioner] may reasonably be expected to understand as an attempt to invoke the privilege." U.S. Br. 22 (quoting *Quinn v. United States*, 349 U.S. 155, 162-63 (1955)) (alteration in U.S. Brief). The Government also suggests – although it is hardly clear why – that a request to speak with a lawyer (thereby seemingly invoking the Sixth Amendment, not the Fifth) or an expressed preference not to make a statement would be reasonably understood to invoke the privilege against self-incrimination, U.S. Br. 24 n.4, as would declining without explanation to be interviewed in the first place, *id.* 28 at n.5.

But, as if those examples do not themselves cause enough head scratching, what about the innumerable other permutations that would inevitably arise? Does "Can we talk about something else?" expressly

invoke the privilege? How about "I'm not sure I want to answer that"? Or what if the suspect simply does not show up for a prearranged interview, as in *State v. Moore*, 965 P.2d 174, 180-81 (Idaho 1998), or just gets up and leaves in the middle of it? Under the Solicitor General's approach, federal and state courts across the country (as well as this Court) can look forward to decades of litigation over this problem, with no clear answers in sight.[2]

By contrast, it is relatively straightforward to identify whether someone faced with police questioning remains silent. Either the person, as here, stands mute, or he responds with words conveying "a desire to remain silent." *Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13 (1986). The Solicitor General asserts that it might sometimes be difficult to differentiate between inadmissible evidence of silence and permissible "demeanor evidence." U.S. Br. 26. But the lower courts, in holdings the Solicitor General endorses (*id.* 32), already have well-developed law dealing with that issue (both in this context and in the context of post-arrest silence). These courts hold that simply

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[2] This line-drawing problem could not be resolved by requiring *unambiguous* pretrial invocations under the circumstances here. Such a requirement would not only contravene *Quinn*, but would also run afoul of this Court's jurisprudence holding that unambiguous invocation requirements are acceptable only when the police assure that a suspect has "full comprehension" of his rights – that is, only when police give something akin to *Miranda* warnings. *Berghuis*, 130 S. Ct. at 2260 (quoting *Burbine*, 475 U.S. at 427). Neither the Solicitor General nor the State requests such a regime.

describing "what a defendant looked like in remaining silent" is "tantamount to [introducing] evidence of silence." *Velarde-Gomez*, 269 F.3d at 1028, 1032 (following case law from other circuits). On the other hand, recounting physical manifestations of ideas or emotions, such as telling the jury that a suspect appeared nervous, is permissible. *See id.* at 1030-31. In all events, the key is whether the "inference suggested" by the prosecution's evidence or argument was that the defendant "was guilty because an innocent person would have [responded] to the [questioning] officers." *United States v. Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993).[3]

b. The Solicitor General's proposal would also raise difficult questions concerning the regulation of police conduct. Neither the Solicitor General nor the State disputes Salinas's assertion (Petr. Br. 31) that if the *Griffin* rule does not apply absent express invocations of the privilege against self-incrimination during noncustodial interviews, then police officers will have an incentive to tell suspects that any silence could be used against them at trial. The group of states as amici all but promise that police departments would start using this tactic to persuade suspects to talk. Br. of Illinois et al. 21-22.

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[3] In a close case, a trial court might reasonably decide to allow the prosecution to introduce the supposed demeanor evidence while instructing the jury that it should not draw any negative inference from the defendant's silence. *Cf. Carter v. Kentucky*, 450 U.S. 288, 305 (1981).

Yet even though a police officer in this circumstance would do nothing wrong by "truthfully informing a suspect" of the law, *id.* at 21, such an official "advisory" would raise due process concerns. When a police officer tells a layperson – especially someone who has not yet received (and has no right to) any advice from counsel – that his silence can be used against him, that person is unlikely to know that he nevertheless could expressly invoke the privilege to avoid such a result. Would this Court, therefore, need to embark on a new line of cases guarding against overly misleading pre-interview advisories? *See, e.g.*, *South Dakota v. Neville*, 459 U.S. 553, 566 (1983) (suggesting that due process prohibits police advice that unfairly 'trick[s]' someone into foregoing right to remain silent). The notion seems unappetizing, but with fundamental constitutional rights at stake, the duty may be hard to avoid.

c. Finally, the Solicitor General asserts that silence in the face of a question during a noncustodial interview should not be assumed to be an exercise of the Fifth Amendment privilege once someone agrees to be interviewed and answers initial questions, thereby supposedly establishing "a baseline of voluntary disclosure to the police." U.S. Br. 25. Insofar as that premise is essential to the Government's proposed rule, it does not map onto the facts of this case – and would be highly manipulable in future cases.

Recall that Salinas agreed to participate in the interview here only after the police told him that its purpose was merely to obtain "elimination prints" and "to clear him as a suspect." J.A. 3, 14. And

during the first part of the interview, the police asked Salinas only about other people. *See* J.A. 15-17. At the first moment when the officers abruptly pivoted their suspicions toward Salinas, and asked him about potential ballistics evidence, he refused to answer that question. J.A. 17-18.

It is a mystery how this sequence represents the actions of someone who has voluntarily agreed to provide incriminating disclosures to the police. Nor does the Solicitor General offer any reason to believe that police officers in the future would not seek to lure targets of investigations – from corporate officers to suspects of street crime – into participating in noncustodial interviews on similarly false pretenses, thereby trying to establish a "baseline of voluntary disclosure" to enable the officers subsequently to generate refusals to answer accusatory questions. *See* Am. Bd. of Crim. Lawyers Amicus Br. 24-25; NACDL Amicus Br. 19-20. This Court should refrain from setting in motion this incentive to mislead citizens and to thwart constitutional values.[4]

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[4] The Solicitor General does not go so far as to argue that once a person begins participating in a noncustodial interview, he may not invoke the Fifth Amendment to refuse to answer selected questions. And although the CJLF makes this argument (Br. 10-12), CJLF ignores petitioner's explanation that selective silence is permissible where, as here, the person's statements "do[] not create evidence for the defense." Petr. Br. 36 n.5. Indeed, if the law in the context of this case were otherwise, no well-counseled person would *ever* take the risk of agreeing to participate in a voluntary police interview. This would hardly be a good outcome for law enforcement.

At any rate, even in the one court that has (in petitioner's view, incorrectly) restricted suspects' ability to selectively

E. The State's Harmless-Error Argument Should Be Left For Remand.

The State never argued in the Texas Court of Appeals or the Court of Criminal Appeals that any Fifth Amendment error here could be harmless. Nor did either appellate court below suggest such a possibility. The State now contends, however, that any erroneous reliance on petitioner's silence was harmless. Resp. Br. 55. Pursuant to this Court's usual practice, this Court should leave the propriety and merit of this belated argument for remand. *See, e.g.*, *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 n.11 (2011). In any event, Salinas has already explained why the State's contention – even if not waived – is meritless. *See* Pet. Reply 6-7.

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exercise their privilege against self-incrimination during noncustodial interviews, the prosecution may use such silence against a defendant only in the narrow situation in which, after becoming "aware" that she was a suspect, the defendant "attempt[s] to exculpate herself with some answers and then later refuse[s] to answer additional questions related to those comments." *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001). The State has never argued – nor could it – that such is the situation here. The police did not make petitioner aware that he was a suspect until they asked him whether the ballistics information would match the shotgun, and petitioner did not offer any exculpatory comments about the shotgun.

CONCLUSION

For the foregoing reasons, the judgment of the Texas Court of Criminal Appeals should be reversed.

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AMICUS CURIAE BRIEF

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GENOVEVO SALINAS, PETITIONER

v.

STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.

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In the Supreme Court of the United States

No. 12-246

GENOVEVO SALINAS, PETITIONER

v.

STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the substantive use at trial of petitioner's silence in response to one question during a consensual interview with the police violated petitioner's Fifth Amendment right against self-incrimination. The Court's resolution of that issue will have significant implications for the conduct of federal investigations and trials. Accordingly, the United States has a significant interest in the case.

STATEMENT

1. In the early morning hours of December 18, 1992, brothers Juan and Hector Garza were murdered in Hector's apartment following a night of partying at the apartment. A neighbor, Martha Trevino, heard gunshots and saw a man run out of the building and drive away in a dark-colored Camaro or Trans Am. Pet. App. 7a-8a.

Officers who arrived at the scene were unable to locate any witnesses other than Trevino. They found no signs of forced entry or any weapons in the house. They recovered six shotgun shells from around the doorway and in the living room. The police questioned people who had attended the party, who referred them to an individual named Damien Cuellar. He provided the police with information leading to petitioner as a suspect. Pet. App. 8a-9a.

Police investigators went to petitioner's home, where he lived with his parents. In the driveway was a dark blue Camaro or Trans Am. The investigators told the family about their murder investigation and obtained consent to search the home. Petitioner's father turned over a shotgun, and petitioner voluntarily accompanied the officers to the Houston police station for questioning. Pet. App. 9a.

Sergeant C.E. Elliott questioned petitioner at the station for nearly one hour. In response to questioning, petitioner told Sergeant Elliott that he knew the Garza brothers and had visited Hector's apartment three or four times before the shooting. Petitioner said he had no disagreement with either brother and that he did not own any weapons aside from the shotgun that had been turned over to the police. When Elliott asked petitioner if ballistics analysis would reveal that the shotgun matched the shells recovered at the murder scene, petitioner did not answer; rather, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, [and] began to tighten up." Pet. App. 11a; J.A. 18. Thereafter, Elliott continued to question petitioner, and petitioner answered all of his questions. Pet. App. 11a-12a.

After the interview, Sergeant Elliott arrested petitioner on outstanding traffic warrants. Although a ballistics analysis matched petitioner's shotgun with the casings found at the murder scene, the Harris County District Attorney's Office declined charges, and petitioner was released. Cuellar subsequently told police that petitioner had confessed to murdering the Garza brothers. Petitioner was charged with murder, but he eluded arrest for nearly 15 years by assuming a false identity. He was captured in 2007. His first trial ended in a mistrial. Pet. App. 2a, 12a-13a.

2. At petitioner's retrial, Sergeant Elliott testified about his interview of petitioner, recounting the initial questioning in which petitioner admitted to knowing the Garza brothers and having visited the apartment three of four times before the shooting. Before eliciting Elliott's testimony concerning petitioner's response to the question whether his shotgun would match the shotgun shells found at the murder scene, the prosecutor approached the bench to obtain a ruling on its admissibility. Defense counsel contended that admission of the evidence would violate the Fifth Amendment and that petitioner could "invoke the Fifth Amendment privilege whether he was in custody or not." J.A. 15. The court questioned whether petitioner had "in fact" invoked his Fifth Amendment privilege. *Ibid.* In response, defense counsel merely observed that petitioner had remained silent. *Ibid.* The court then went off the record.

When Sergeant Elliott's examination resumed, the prosecutor, over petitioner's objection, elicited testimony that Elliott had asked petitioner if the shotgun in question would match the shells recovered at the murder scene. J.A. 17. Elliott testified that petitioner "did not answer" the question, and that petitioner "[l]ooked

down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." J.A. 17-18. Elliott further explained that he continued to question petitioner, and petitioner answered his questions until the interview ended. J.A. 18-19. The only question that petitioner did not answer was the one about the possibility of a ballistics match. J.A. 19.

During closing arguments, the prosecutor argued, over the defense's objection, that petitioner's silence was evidence of his guilt. He pointed out that petitioner did not answer the question about whether the shells found at the murder scene would match the shotgun, and he argued that "an innocent person" would have asserted that the shotgun would not match the shells found at the scene. Pet. App. 18a-19a.

The jury convicted petitioner of the murder of Juan Garza and sentenced him to 20 years of imprisonment. Pet. App. 13a; Pet. Br. 7.

3. The intermediate court of appeals affirmed. Pet. App. 7a-23a. The court rejected petitioner's claim that the use of his pre-arrest, pre-*Miranda* silence as substantive evidence of his guilt violated his Fifth Amendment privilege against self-incrimination. *Id.* at 18a-23a. The court reasoned that the Fifth Amendment prohibits only *compelled* self-incrimination and that, "[a]bsent a showing of government compulsion * * * the Fifth Amendment has no applicability to pre-arrest, pre-*Miranda* silence used as substantive evidence in cases in which the defendant does not testify." *Id.* at 22a. Because petitioner voluntarily spoke with the police and was not subjected to any compulsion, the court held that the Fifth Amendment did not bar the substantive use of petitioner's failure to answer the question at issue. *Id.* at 23a.

4. The Texas Court of Criminal Appeals affirmed. Pet. App. 1a-6a. The court explained that although this Court has held that the Fifth Amendment prohibits any comment on a defendant's refusal to testify at trial, *Griffin* v. *California*, 380 U.S. 609 (1965), it has accorded less protection to a defendant's pretrial silence. Pet. App. 3a. The Court of Criminal Appeals further explained that under Supreme Court precedent, the prosecution may not use a defendant's post-arrest, post-*Miranda* silence to impeach his testimony at trial, see *Doyle* v. *Ohio*, 426 U.S. 610, 618 (1976), but the prosecution may use a defendant's pre-*Miranda* silence for impeachment purposes, see *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). Pet. App. 4a. Relying on Justice Stevens' concurring opinion in *Jenkins*, the Court of Criminal Appeals held that "[i]n pre-arrest, pre-*Miranda* circumstances, a suspect's interaction with police officers is not compelled," and "the Fifth Amendment right against compulsory self-incrimination is 'simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.'" *Id.* at 6a (quoting *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring in the judgment)).

Judge Johnson dissented without opinion. Pet. App. 6a.

SUMMARY OF ARGUMENT

Police investigators often ask suspects who are not in custody if they would be willing to answer questions, and the Fifth Amendment generally permits the voluntary statements elicited in such interviews to be used as evidence of a suspect's guilt at a subsequent trial. This case presents the question whether a suspect's brief silence, in response to a question during a consensual

interview, may similarly be used as evidence of guilt. The answer is yes.

A. The core right conferred by the Self-Incrimination Clause of the Fifth Amendment is the right not to be compelled to testify against oneself at a criminal trial. To effectuate that right, this Court held in *Griffin* v. *California*, 380 U.S. 609 (1965), that the prosecution may not argue that a defendant's failure to testify at trial raises an inference of guilt, reasoning that such an inference is a "penalty * * * for exercising a constitutional privilege." *Id.* at 614. Petitioner's contention—that the admission of his mid-interview silence as evidence against him at trial unconstitutionally compelled him to be a witness against himself—turns on whether *Griffin*'s rationale should be extended beyond the trial context. It should not.

B. *Griffin*'s holding is based on the understanding that a defendant who declines to testify at trial—thereby remaining silent—is necessarily "exercising" his Fifth Amendment privilege. 380 U.S. at 614. *Griffin* is an exception to the general rule that "the burden appropriately lies with [a witness] to make a timely assertion of the privilege," in order to put the government on notice that Fifth Amendment rights are at stake. *Garner* v. *United States*, 424 U.S. 648, 655 (1976). Consistent with that rule, the Court has held in several contexts that "silence"—the unexplained failure to respond to official inquiries—is not an exercise of the Fifth Amendment privilege and that the Amendment does not prohibit the government from punishing such silence. See, *e.g.*, *Roberts* v. *United States*, 445 U.S. 552 (1980); see also *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2259-2260 (2010).

The Court has excused the invocation requirement in certain "well-defined" circumstances. *Minnesota* v. *Murphy*, 465 U.S. 420, 429 (1984). First, when the government deters or prevents a witness from invoking the privilege—for instance, by subjecting the witness to the inherent pressures of custodial interrogation, or threatening to punish invocation—the witness need not invoke the Fifth Amendment. See *id.* at 429-440. Second, in the trial context at issue in *Griffin*, a defendant need not expressly invoke the Fifth Amendment in order to "exercis[e]" the privilege. 380 U.S. at 614. That is because a defendant who does not take the stand necessarily exercises the core, "absolute" Fifth Amendment right to decline to testify at trial for any reason. *Turner* v. *United States*, 396 U.S. 398, 433 (1970). And any defendant who decides not to testify doubtlessly relies on the Fifth Amendment's overriding purpose of ensuring that the burden of proving guilt always remains on the prosecution. Thus, unlike in the mine run of situations in which invocation is required, the failure to testify invariably implicates the policies underlying the Fifth Amendment.

C. Petitioner's contention that *Griffin* bars the use of his transitory silence during a noncustodial interview rests on the assumption that his silence should be treated as an exercise of Fifth Amendment rights notwithstanding his failure to expressly invoke the privilege. But neither of the justifications for excusing the invocation requirement that this Court has recognized are present here. First, no official coercion or threat of a penalty prevents a suspect in a noncustodial interview from expressly invoking the Fifth Amendment privilege. Second, while a defendant who does not take the stand at trial necessarily exercises the Fifth Amendment

privilege, a suspect who is briefly silent—but does not invoke the privilege—during a noncustodial interview cannot be understood as necessarily relying on a right to stop cooperating and stand on his constitutional privilege. That silence could reflect surprise, uncertainty at the thrust of the question, or an attempt to settle on the most exculpatory answer. Excusing the invocation requirement would thus protect a great deal of conduct that is entirely unrelated to the Fifth Amendment.

Prosecutorial use of a defendant's mid-interview silence as evidence of guilt therefore does not penalize the "exercis[e]" of the Fifth Amendment privilege under *Griffin*. 380 U.S. at 614. Nor does such use have any other unconstitutional compulsive effect: it does not lower the prosecution's burden of proof or exert undue pressure on the defendant to take the stand at trial.

D. In this case, petitioner voluntarily began answering questions related to the murder investigation and his status as a suspect. When asked about the ballistics evidence, petitioner could have invoked his Fifth Amendment privilege, but he simply did not answer instead, giving rise to the permissible inference that he was attempting unsuccessfully to formulate an exculpatory response. The prosecution's substantive use of petitioner's silence as evidence of guilt did not violate the Fifth Amendment.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT PROHIBIT THE SUBSTANTIVE USE AT TRIAL OF A SUSPECT'S SILENCE IN RESPONSE TO A QUESTION DURING A NONCUSTODIAL POLICE INTERVIEW

Petitioner voluntarily answered police questions in a noncustodial setting, but he remained silent in response to a single question about whether the shells found at

the crime scene would match his shotgun. Because petitioner did not affirmatively invoke his Fifth Amendment privilege against compelled self-incrimination, his silence—as well as police testimony concerning petitioner's nervous-seeming demeanor in reaction to the question—was properly admitted as substantive evidence of his guilt at trial.

In only two contexts has the Court excused the general requirement that a witness who wishes to exercise his Fifth Amendment rights must expressly invoke the privilege and held that mere silence may be construed as an invocation. First, the Court has excused invocation in situations in which the government exerts coercive pressure designed to deter a witness from invoking the right. See *Minnesota* v. *Murphy*, 465 U.S. 420, 429 (1984). Second, in *Griffin* v. *California*, 380 U.S. 609 (1965), the Court held that the prosecution may not argue that a defendant's failure to testify at trial raises an inference of guilt because such an inference is a "penalty * * * for *exercising* a constitutional privilege." *Id.* at 614 (emphasis added). In the trial context at issue in *Griffin*, excusing invocation can be justified because a defendant who does not take the stand at trial necessarily relies on the core Fifth Amendment right to decline to testify at trial.

Those rationales have no application to a suspect's transitory silence during a noncustodial police interview. Petitioner could have invoked his Fifth Amendment right not to answer the question without being subject to any penalty (including the use of that invocation at trial), but he chose to be silent instead. And his silence in the course of a voluntary, noncustodial interview did not necessarily rely on his Fifth Amendment rights. Prosecutorial use of a defendant's mid-interview silence

as evidence of guilt therefore does not penalize the "exercis[e]" of the Fifth Amendment privilege under *Griffin*. 380 U.S. at 614.

A. Because The Fifth Amendment Prohibits Only Compelled Self-Incrimination, Petitioner Must Demonstrate That The Use Of His Silence At Trial Had An Unconstitutionally Compulsive Effect

1. a. The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The Self-Incrimination Clause reflects "a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Doe* v. *United States*, 487 U.S. 201, 212 (1988) (citations and emphasis omitted). The touchstone of the Clause is therefore compulsion: "the Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials." *United States* v. *Washington*, 431 U.S. 181, 186 (1977). Rather, the Amendment "proscribes only self-incrimination obtained by a 'genuine compulsion of testimony.'" *Id.* at 187 (citation omitted); see *Michigan* v. *Tucker*, 417 U.S. 433, 448 (1974).

Accordingly, "[v]olunteered statements of any kind are not barred by the Fifth Amendment." *Miranda* v. *Arizona*, 384 U.S. 436, 478 (1966). "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make." *Ibid.* Absent the coercion prohibited by the Fifth Amendment, voluntary "admissions of guilt by wrongdoers * * * are inherently desirable," subject to defined limitations, and

the police may seek such a confession or other evidence from a suspect. *Washington*, 431 U.S. at 187.

b. The core protection afforded by the Fifth Amendment is that a criminal defendant cannot be compelled to testify against himself at a criminal trial. See *Chavez* v. *Martinez*, 538 U.S. 760, 764-767 (2003) (plurality opinion); *id.* at 777 (Souter, J., concurring in the judgment); *Tucker*, 417 U.S. at 440. To effectuate that "absolute right," *Turner* v. *United States*, 396 U.S. 398, 433 (1970), the Court held in *Griffin*, *supra*, that no penalty may be imposed on a defendant for refusing to testify at a criminal trial. In *Griffin*, the prosecution had argued, and the court had instructed the jury, that the defendant's refusal to testify constituted substantive evidence of his guilt. The adverse inference drawn from a defendant's refusal to testify, the Court held, "is a penalty imposed by courts for exercising a constitutional privilege" that "cuts down on the privilege by making its assertion costly." 380 U.S. at 614. Permitting an inference of guilt based on the defendant's decision not to take the stand would lower the prosecution's burden of proof by "allow[ing] the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." *Id.* at 613. That significant penalty would deter the exercise of the privilege, thus implicating the protection against compelling the defendant to testify within the meaning of the Fifth Amendment. See *Jenkins* v. *Anderson*, 447 U.S. 231, 242 (1980) (Stevens, J., concurring in the judgment).

c. Although the core Fifth Amendment privilege concerns the criminal trial, the Court has permitted the privilege to be asserted in "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'"

Murphy, 465 U.S. at 426 (quoting *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973)); see *Tucker*, 417 U.S. at 440. Accordingly, the Court has held that a witness's invocation of the Fifth Amendment privilege to avoid testifying before the grand jury may not be used against him in a subsequent criminal trial. See *Grunewald* v. *United States*, 353 U.S. 391, 421 (1957).

The Court has further extended the Fifth Amendment privilege to police interrogations. See *Miranda*, 384 U.S. at 461, 467, 478. In the context of custodial interrogations—those in which the defendant is under arrest or subject to comparable restrictions on his ability to leave, *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995)—the Court has held that the "inherently compelling" pressures of custodial interrogation necessitate certain protections to ensure the efficacy of the Fifth Amendment privilege. *Murphy*, 465 U.S. at 430. Thus, a suspect's statements in a custodial interrogation may not be used against him at trial unless he "fails to claim the Fifth Amendment privilege after being suitably warned" of his rights, including the right to remain silent. *Ibid.*; *Miranda*, 384 U.S. at 467-469.

The Court has also accorded some protection to a suspect's *silence* in response to custodial questioning conducted after he has received *Miranda* warnings—but on due process, not Fifth Amendment, grounds. Post-*Miranda* silence, the Court held, has been "induced" by the government's action in informing the suspect of his *Miranda* rights because those warnings implicitly assure the suspect that "silence will carry no penalty." *Doyle* v. *Ohio*, 426 U.S. 610, 617-618 (1976). It would be "fundamentally unfair," therefore, to use the defend-

ant's silence against him at trial.[1] *Id.* at 618. Although the Court's decision in *Doyle* concerned only the use of the defendant's silence to impeach his trial testimony, *Doyle*'s rationale would apply *a fortiori* to use of a defendant's post-*Miranda* silence as evidence of guilt. The Court has declined, however, to extend *Doyle*'s due process rationale to situations in which the suspect's silence precedes *Miranda* warnings. See *Jenkins*, 447 U.S. at 239-240 (before *Miranda* warnings, "no governmental action [has] induced petitioner to remain silent"); *Fletcher* v. *Weir*, 455 U.S. 603, 606 (1982) (per curiam).

2. This case concerns the Fifth Amendment protection accorded to a suspect's silence during a noncustodial police interview—specifically, whether petitioner's brief silence during a voluntary interview may be used against him in the prosecution's case in chief at trial. Because petitioner was not in custody for purposes of *Miranda*, Pet. App. 23a; Pet. Br. 3, he was not subjected to the inherent coercion of custodial interrogation.[2] Cf.

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[1] Although the Court suggested in *Miranda* that the Fifth Amendment would prohibit the use at trial of a defendant's "exercising his Fifth Amendment privilege" in a custodial interview, 384 U.S. at 468 n.37, that statement was dicta, and the Court did not repeat it in *Doyle*. 426 U.S. at 616-619.

[2] Because petitioner does not contend that he was informed of his *Miranda* rights before his silence occurred, *Doyle* does not apply here. See *Jenkins*, 447 U.S. at 239-240. As petitioner explains (Br. 3 n.1), however, some testimony in petitioner's first trial may indicate that petitioner was in fact given *Miranda* warnings before the silence at issue here. *Ibid.*; Resp. Br. 1. Petitioner did not present evidence to that effect in his second trial—which resulted in the conviction challenged here—and he has not raised any claim under *Doyle*. The parties have therefore proceeded under the assumption that petitioner did not receive *Miranda* warnings before or during the interview in question. See Pet. Br. 3 n.1.

Miranda, 384 U.S. at 467-469. Nor does petitioner assert that any coercive police tactics or threats rendered the interview involuntary. Petitioner's contention that the admission of his mid-interview silence as evidence against him at trial unconstitutionally compelled him to be a witness against himself therefore turns on whether *Griffin*'s rationale—that adverse use of the failure to testify impermissibly penalizes a defendant's exercise of his Fifth Amendment rights—applies to a suspect's brief silence during a voluntary interview.

B. *Griffin* Treats A Defendant's Failure To Testify At Trial As An *Exercise* Of The Fifth Amendment Privilege And Is Therefore An Exception To The General Rule That A Witness Must Expressly Invoke The Fifth Amendment Privilege In Order To Exercise It

Griffin treats the failure to testify as an "exercis[e] [of] a constitutional privilege," 380 U.S. at 614, and thus excuses an explicit assertion of Fifth Amendment rights. *Griffin* is an exception to the general rules in Fifth Amendment cases that "the burden appropriately lies with [a witness] to make a timely assertion of the privilege," in order to put the government on notice that Fifth Amendment rights are at stake, and that "silence"—the unexplained failure to respond to inquiries—is not considered an exercise of the Fifth Amendment privilege. *Garner* v. *United States*, 424 U.S. 648, 655 (1976). That exception can be understood in light of the realities of the trial process, in which a defendant's decision to stay off the stand—made in consultation with counsel—necessarily implicates, and relies on, the core Fifth Amendment privilege not to be compelled to testify at trial.

1. A witness who wishes to exercise the Fifth Amendment privilege generally must expressly invoke it

a. The Fifth Amendment does not prohibit the government from compelling a witness to answer questions, for instance, by punishing his refusal to do so, when the witness does not seek to exercise his privilege against self-incrimination. See *Garner*, 424 U.S. at 656-657. In other words, if an individual wishes to decline to answer an official inquiry for some reason other than his desire to exercise his Fifth Amendment right—for instance, he wishes to claim some other privilege—then the Fifth Amendment privilege is not at stake, and the Amendment does not prohibit official attempts to compel cooperation or to punish a lack of cooperation. See *Murphy*, 465 U.S. at 427 (individual may be held in contempt for not answering questions before a grand jury, unless he "is required to answer over his valid claim of the privilege"); see also, *e.g.*, *Rogers* v. *United States*, 340 U.S. 367, 370-371 (1951) (upholding contempt judgment where witness stated that she preferred not to answer questions that might subject others to punishment instead of invoking the privilege); *United States* v. *Murdock*, 284 U.S. 141, 148-149 (1931) (upholding prosecution for failure to file tax returns where defendant's noncompliance was based on a justification outside of the then-governing scope of the Fifth Amendment), disapproved on other grounds, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).

b. Accordingly, the general rule is that the Fifth Amendment privilege is not self-executing, and if an individual "desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia*, 317 U.S. 424, 427 (1943); see

Murphy, 465 U.S. at 425, 427. Because the individual facing government inquiries is best positioned to know whether the disclosure sought may incriminate him, it is appropriate to require him to invoke the privilege at the time the disclosures are sought. *Garner*, 424 U.S. at 655. That assertion "put[s] the Government on notice" that Fifth Amendment rights are at stake and that further efforts to compel answers or to punish non-cooperation may implicate the Fifth Amendment. *Murphy*, 465 U.S. at 428 (citation omitted).

i. If an individual facing an official inquiry answers the government's questions without invoking his Fifth Amendment privilege, the individual's answers are generally considered voluntary for purposes of the Amendment. *Murphy*, 465 U.S. at 428. The act of answering the questions is inconsistent with a desire to exercise any right against self-incrimination, and the "government ordinarily may assume that [it is] * * * not eliciting testimony that [the witness] deems to be incriminating." *Garner*, 424 U.S. at 655. The individual may not subsequently rely on the privilege to prevent his answers from being used against him in a criminal prosecution. *Murphy*, 465 U.S. at 427, 440; *Garner*, 424 U.S. 654-656.

ii. Similarly, if an individual does not respond to the government's questions and does not invoke his right against self-incrimination, he is ordinarily viewed as having failed to exercise his Fifth Amendment rights. In other words, silence—the failure to respond to or cooperate with government inquiries—is not presumed to be an exercise of the Fifth Amendment right.

For instance, in *Roberts* v. *United States*, 445 U.S. 552 (1980), the Court rejected the defendant's argument that his unexplained refusal, post-conviction, to provide

the government with information about an ongoing conspiracy should be understood as an exercise of his right against self-incrimination that could not be used against him at sentencing. *Id.* at 559-561. The defendant's silence, in the absence of any affirmative invocation of his rights either when questioned or at sentencing, could have reflected motivations having nothing to do with the Fifth Amendment privilege: "The principal divisive issue in this case is whether petitioner's silence should have been understood to imply continued solicitude for his former criminal enterprise, rather than assertion of the Fifth Amendment right against self-incrimination or fear of retaliation." *Id.* at 562 (Brennan, J., concurring)). Emphasizing that the defendant could have invoked the privilege, the Court held that the defendant's noncooperation should not be treated as an exercise of his Fifth Amendment rights. *Id.* at 559-560 & n.6; *id.* at 562 (Brennan, J., concurring) ("[P]etitioner may not stand upon a Fifth Amendment privilege that he never invoked at the time of his silence.").

The Court has also held that the Fifth Amendment does not prohibit prosecuting a taxpayer's "silence" in failing to file a tax return, where the taxpayer could have simply filed the return and invoked the Fifth Amendment in response to specific questions. See *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927). The Court thus declined to construe the failure to file as a proper invocation of the right. See also *Vatjauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927) (holding that witness could not subsequently rely on the Fifth Amendment when he had declined to answer questions without invoking the privilege).

In addition, in the related context of invocation of *Miranda* rights—rights that "protect the privilege

against compulsory self-incrimination"—the Court has held that suspects must unambiguously invoke the right to cut off questioning and that remaining silent for over two hours during an interrogation was insufficiently unambiguous to invoke the right. *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2256, 2259-2260 (2010). The Court's decision placed the burden on the suspect in an interrogation to make a "simple, unambiguous statement[ ]" that he wishes to cut off questioning, and it held that in the absence of such a statement, the police may assume that the suspect has not invoked his right. *Id.* at 2260.

c. While in "certain well-defined situations" a witness is excused from affirmatively invoking the Fifth Amendment, those situations are ones in which the government has effectively prevented the witness from invoking the privilege. *Murphy*, 465 U.S. at 429. In those circumstances, it is clear that Fifth Amendment rights are at stake because the government has exerted coercive pressure to cause the witness to forgo invoking the right. It is therefore appropriate to deviate from the normal rule requiring invocation.

Thus, a witness need not expressly invoke the Fifth Amendment when he is subjected to custodial interrogation, because the "inherently coercive" environment necessitates the "extraordinary safeguard" of disallowing any unwarned statements. *Murphy*, 465 U.S. at 429-430; *Miranda*, 384 U.S. at 467. In addition, when the government expressly threatens a witness with severe sanctions—such as being fired or being prohibited from holding office—for refusing to testify, including on Fifth Amendment grounds, the witness is deprived of the ability to freely choose between invoking the privilege and speaking, and the invocation requirement is ex-

cused. See *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977) (state law imposed penalty on refusing to waive immunity); *Garrity* v. *New Jersey*, 385 U.S. 493, 494 (1967). Finally, the Court has excused the invocation requirement when the applicable regulatory regime makes the act of invoking the privilege—thereby identifying oneself to the government—inherently incriminating. See *Marchetti* v. *United States*, 390 U.S. 39 (1968). In that situation, the Court "forgave the usual requirement" of invocation "in favor of a 'claim' by silence." *Garner*, 424 U.S. at 659 n.11. In this limited context, then, silence may be construed as invocation.

2. Griffin *treats a defendant's failure to testify at trial as an exercise of the Fifth Amendment privilege*

Griffin prohibits drawing an adverse inference from a defendant's failure to testify at trial, regardless of whether the defendant, in declining to testify, expressly invokes his Fifth Amendment privilege. Although *Griffin* did not discuss the general rule that a defendant must invoke the privilege in order to make clear that he intends to exercise his Fifth Amendment right, the decision is premised on the understanding that a defendant's failure to testify at trial is an exercise of Fifth Amendment rights.[3] 380 U.S. at 614 (adverse inference is a "penalty imposed by the courts for *exercising* a constitu-

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[3] Later decisions elaborating on or discussing the *Griffin* rule have invariably described *Griffin* as prohibiting prosecutorial comment on a defendant's *exercise* of his Fifth Amendment privilege. See, *e.g.*, *Mitchell* v. *United States*, 526 U.S. 314, 330 (1999); *Chapman* v. *California*, 386 U.S. 18, 19 (1967); *Chavez*, 538 U.S. at 768-769; *Wainwright* v. *Greenfield*, 474 U.S. 284, 291 n.7 (1986); *Lakeside* v. *Oregon*, 435 U.S. 333, 339 (1978); *Tucker*, 417 U.S. at 441 n.14; *Mackey* v. *United States*, 401 U.S. 667, 673 (1971); *United States* v. *Jackson*, 390 U.S. 570, 583, n.25 (1968).

tional privilege") (emphasis added); see *Jenkins*, 447 U.S. at 242 (Stevens, J., concurring in the judgment) ("In the trial context, it is appropriate to presume that a defendant's silence is an exercise of the constitutional privilege," thereby excusing the invocation requirement, "and to prohibit any official comment that might deter him from exercising that privilege."). Excusing the invocation requirement in the trial context can be justified for several reasons.

The right against compulsion to testify in one's own criminal trial is the core protection afforded by the Fifth Amendment. See *United States* v. *Patane*, 542 U.S. 630, 636 (2004) (plurality opinion); *Chavez*, 538 U.S. at 766-767; *id.* at 777 (Souter, J., concurring in the judgment) ("the text of the Fifth Amendment * * * focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence"). Because "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so," *Harris* v. *New York*, 401 U.S. 222, 225 (1971), a defendant who does not testify at his trial is literally exercising that core right not to do so, regardless of his particular motivations for not testifying, and regardless of whether he expressly invokes the Fifth Amendment. See *Turner*, 396 U.S. at 433 (a defendant has an "absolute right not to testify at his own trial unless he freely chooses to do so").

As a result, a defendant's failure to testify necessarily implicates the central purposes of the Fifth Amendment. A primary purpose of the rule against compelled testimony is to preserve the accusatorial system of criminal justice by ensuring that the burden of proving guilt by evidence "independently and freely secured" always

remains on the prosecution. *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); see *Mitchell*, 526 U.S. at 330. Any defendant who decides not to testify—knowing that the prosecution must prove guilt beyond a reasonable doubt regardless of whether the defendant offers any defense—doubtless has relied at least in part on this fundamental tenet of the Fifth Amendment. Thus, unlike in the mine run of situations in which invocation is required—where invocation serves to notify the government that Fifth Amendment rights, rather than some other, unprotected, desire not to cooperate, see pp. 15-16, *supra*—the failure to testify necessarily implicates the policies underlying the Fifth Amendment. It therefore makes sense—and furthers the Fifth Amendment's purposes—to treat a defendant's failure to testify as an exercise of his Fifth Amendment right regardless of whether he invokes the right.

C. No Justification Excuses The Invocation Requirement When A Suspect Is Briefly Silent During A Noncustodial Interview, And Therefore The Fifth Amendment Does Not Bar Use Of That Silence As Substantive Evidence

Petitioner's contention that *Griffin* bars the use of his transitory silence during a noncustodial interview rests on the assumption that his silence should be treated as an exercise of Fifth Amendment rights notwithstanding his failure to invoke the privilege. But neither of the justifications for excusing the invocation requirement that this Court has recognized exists here. First, unlike in the situations in which the Court has excused the invocation requirement in the pretrial context, see pp. 18-19, *supra*, a suspect in a noncustodial interview could expressly invoke the Fifth Amendment without penalty. Second, while a defendant's decision not take the stand at trial for any reason inherently exercises the

Fifth Amendment privilege, a suspect's transitory silence, unaccompanied by any invocation, in a noncustodial interview does not inherently signal a desire to stop cooperating based on his constitutional rights. Excusing the invocation requirement would thus protect a great deal of conduct that is entirely unrelated to the Fifth Amendment. Prosecutorial use of a defendant's mid-interview silence as evidence of guilt therefore does not penalize the "exercis[e]" of the Fifth Amendment privilege under *Griffin*. 380 U.S. at 614. Nor does such use exert any other unconstitutional compulsive effect.

1. Expressly invoking the Fifth Amendment and merely failing to respond to questions present distinct issues

In arguing that *Griffin*'s rationale bars the use of his silence, petitioner incorrectly assumes that a suspect in a voluntary police interview has two options: responding to questions, or "remain[ing] silent." *E.g.*, Pet. Br. 17. In fact, a suspect has three choices: answering, invoking the Fifth Amendment privilege, or simply remaining mute. The latter two courses are distinct.

When a suspect expressly invokes his Fifth Amendment privilege during a noncustodial interview, that invocation may not be used as substantive evidence against him. By invoking the privilege—*i.e.*, making the claim "in any language that [the questioner] may reasonably be expected to understand as an attempt to invoke the privilege," *Quinn* v. *United States*, 349 U.S. 155, 162-163 (1955)—a suspect clearly "exercis[es]" his "constitutional privilege." *Griffin*, 380 U.S. at 614. To use the suspect's reliance on his Fifth Amendment right as substantive evidence of his guilt at trial would penalize the exercise of the right, "mak[ing] its assertion costly." *Ibid.* Although the Court has rightly declined to extend *Griffin*'s rationale to every situation in which

a witness's invocation of the Fifth Amendment may come at some cost, particularly in the civil context, see *Mitchell*, 526 U.S. at 328, drawing an inference of guilt from a defendant's invocation of the Fifth Amendment in response to police questioning would be a severe penalty on the exercise of the privilege that would deter its use in police investigations. Cf. *Tucker*, 424 U.S. at 440 (pretrial inability to protect the privilege may undermine its efficacy at trial). By analogy to *Griffin*, then, lower courts have generally held that when a suspect in a noncustodial interview has invoked the privilege, his refusal to answer the inquiries in question may not be used against him at trial. See, *e.g.*, *Combs* v. *Coyle*, 205 F.3d 269, 279, 281 (6th Cir.), cert. denied, 531 U.S. 1035 (2000); *Coppola* v. *Powell*, 878 F.2d 1562, 1567-1568 (1st Cir.), cert. denied, 493 U.S. 969 (1989).

By contrast, when a suspect is simply silent for an interval while voluntarily answering questions, that equivocal conduct raises questions about what that silence means. A suspect who sits silent does not expressly invoke the privilege. Cf. *Thompkins*, 130 S. Ct. at 2260 (suspect's post-warning silence, lasting over two hours, was insufficient to unambiguously invoke the right to remain silent). The question therefore becomes whether the invocation requirement should be excused, as in *Griffin* itself, such that a suspect's mid-interview silence may be treated as an "exercis[e]" of the Fifth Amendment privilege for purposes of *Griffin*.

2. The invocation requirement should not be excused when a suspect is briefly silent during a noncustodial interview

No justification exists for excusing the invocation requirement when a suspect is silent during a noncustodial interview.

a. Unlike in *Miranda* and the cases in which the government threatened to penalize the invocation of the Fifth Amendment privilege, a suspect being questioned in a noncustodial situation has the ability freely to invoke the right. See pp. 18-19, *supra*. Where a suspect "will have no problem effectively claiming the privilege at the time disclosures are requested," there is "no reason to forgive the requirement that the claim be presented." *Murphy*, 465 U.S. at 440.

As the Court held in *Murphy*, a suspect in a noncustodial interview ordinarily has the ability to invoke the Fifth Amendment privilege. 465 U.S. at 440. Because "virtually every schoolboy is familiar with the concept, if not the language," of the Fifth Amendment, *Tucker*, 417 U.S. at 439, the Court has assumed that suspects being interviewed in noncustodial situations are generally aware of their Fifth Amendment privilege, even though they have not received *Miranda* warnings.[4] See *Murphy*, 465 U.S. at 429, 440 (holding that an individual on probation could have invoked his Fifth Amendment right in a noncustodial interview). In a noncustodial interview, moreover, the suspect is not subjected to compulsion of the sort that has led the Court to excuse invocation in other contexts: the "inherently coercive" pressures of custodial interrogation are not present, and the suspect's invocation could not be used against him at trial. See *id.* at 438-439 (probationer could not have feared being penalized for invoking his right in view of

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[4] Indeed, suspects routinely invoke the privilege without being given *Miranda* warnings. See, *e.g.*, *Combs*, 205 F.3d at 279 ("talk to my lawyer"); *Coppola*, 878 F.2d at 1564 (statement that suspect would not confess and police should talk to his lawyer); *Savory* v. *Lane*, 832 F.2d 1011, 1015 (7th Cir. 1987) (suspect said he "didn't want to make any statement" to the police).

the rule against such penalties). Express invocation may be excused in individual cases if the police threaten the suspect with punishment for invoking the privilege. See *id.* at 436-438 (suspect may be excused from invoking when questioner threatens to punish the suspect for invoking the right). Absent that sort of deterrent, a suspect is fully capable of affirmatively invoking the privilege.

b. In addition, unlike in *Griffin*, a suspect who fails to respond to questions in an interview but does not affirmatively invoke the privilege is not engaging in conduct that necessarily implicates a core Fifth Amendment right or the purposes animating the privilege. Outside of the trial context, the Court has not treated a witness's silence as inherently an exercise of Fifth Amendment rights, particularly when, as here, the witness could expressly invoke the privilege. Cf. *Thompkins*, 130 S. Ct. at 2259-2260; *Roberts*, 445 U.S. at 560; *Sullivan*, 274 U.S. at 263-264. There is no reason to assume that a suspect's transitory silence during a noncustodial interview reflects any desire to avoid cooperating with authorities as a matter of right.

By agreeing to the police's request to be interviewed, and by beginning to answer questions, a suspect in petitioner's position establishes a baseline of voluntary disclosure to the police. Unlike a defendant who declines to take the stand at his trial, or a suspect who refuses to answer any police questions, the suspect takes actions that are inconsistent with any intention to exercise the privilege—indeed, for that reason, the statements he does make may be used against him at trial. See *Murphy*, 465 U.S. at 429. Against that backdrop, a brief failure to respond to questions during an interview—while answering other questions before and

after the silence—more likely than not reflects motivations that have nothing to do with a desire to rely on the Fifth Amendment's protections. For instance, a suspect's brief silence could reflect surprise, uncertainty at the thrust of the question, or an attempt to settle on the most exculpatory answer. See *United States* v. *Davenport*, 929 F.2d 1169, 1174 (7th Cir. 1991) (government may comment on failure to respond to particular questions in a noncustodial interview because such silence likely reflects a desire to craft the most exculpatory narrative), cert. denied, 502 U.S. 1031 (1992).

The conclusion that transitory silence is at best tenuously connected to any conduct protected by the Fifth Amendment is reinforced by the fact that such silence is practically indistinguishable from the suspect's nontestimonial demeanor. A suspect's demeanor during questioning is generally admissible at trial because it is "nontestimonial," in that it does not reflect communication by the suspect. *Pennsylvania* v. *Muniz*, 496 U.S. 582, 592, 594 (1990). Police may permissibly observe and testify, therefore, that a suspect paused for a long time before answering each question, or that he ended an answer by trailing off mid-thought and then appeared nervous. A suspect's silence in response to a mid-interview question, unaccompanied by any affirmative indication that the suspect intends to communicate any desire to invoke the right, is distinguishable from these permissible forms of demeanor evidence only as a matter of degree.

Unlike in the trial context, then, where every defendant's decision not to testify at trial may be viewed as implicating the core purposes of the Fifth Amendment, excusing the invocation requirement here by construing silence as invariably reflecting an exercise of Fifth

Amendment rights would likely protect a great deal of conduct that is entirely unrelated to the Fifth Amendment. There is therefore no justification for excusing the invocation requirement in the context of a suspect's transitory silence during a voluntary interview.

3. Permitting prosecutorial use of silence, when the suspect could have but did not invoke the privilege, does not subject the suspect to any unconstitutional compulsion

a. Because a suspect in a noncustodial interview is subject to the normal rule that he must invoke the Fifth Amendment, his brief silence in the midst of the interview cannot be considered an exercise of his Fifth Amendment right. As a result, the prosecution's use of that silence in its case in chief is not a "penalty * * * for exercising a constitutional privilege," and it is not barred by *Griffin*. 380 U.S. at 614. Rather, the use of such silence is comparable to the other situations in which the Court has held that the government could permissibly use the witness's silence against him because that silence could not be construed as an exercise of the Fifth Amendment privilege. See pp. 16-18, *supra*; *Roberts*, 445 U.S. at 560; *Sullivan*, 274 U.S. at 263-264. Because witnesses in those situations could have invoked the Fifth Amendment but did not, imposing penalties on silence did not exert any unconstitutional coercion. The same is true with respect to silence during a noncustodial interview.

Contrary to petitioner's argument (Br. 14, 19-20), permitting the use of silence as substantive evidence in the situation presented here does not subject the suspect to the "cruel trilemma" of incriminating himself, lying, or being punished for refusing to cooperate. See *Waterfront Comm'n*, 378 U.S. at 55. The suspect is not

forced to confront any such quandary because he may invoke his Fifth Amendment privilege without penalty.[5] Because that invocation cannot be used as evidence at trial, the suspect has a ready option that permits him to avoid incriminating himself or exposing himself to liability for false statements.[6]

b. Petitioner's remaining arguments that the prosecution's use of silence during a noncustodial interview exerts coercive effects prohibited by the Fifth Amendment are not persuasive.

Permitting the prosecution to rely on a defendant's silence in response to questioning during a voluntary interview does not risk relieving the prosecution of its burden of proving the defendant's guilt at trial, thereby coercing him to speak during the interview. But see Pet. Br. 14, 18-20. In such cases, the ability to use evidence of a defendant's silence may be incrementally helpful to the prosecution in shouldering its burden of proof. But the government may obtain helpful evidence

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[5] In addition to invoking the privilege during questioning, a suspect could do so by expressly declining to be questioned in the first place. Courts have generally treated an explicit, blanket refusal as sufficient to invoke the Fifth Amendment. See, *e.g.*, *Savory*, 832 F.2d at 1017-1018.

[6] If, however, the police attempt to coerce the suspect into forgoing his Fifth Amendment privilege, for instance, by threatening him with physical harm if he invokes his right, a different situation would be presented. Cf. National Ass'n of Criminal Defense Lawyers Amicus Br. 8-9. In that circumstance, if he does speak, the threat of a penalty on "the assertion of the privilege" might well render the suspect's statements compelled for purposes of the Fifth Amendment. See *Murphy*, 465 U.S. at 434; *Lefkowitz*, 431 U.S. at 806. In addition, coercive police conduct might render the interview custodial, necessitating *Miranda* warnings and the exclusion of any unwarned statements. *Miranda*, 384 U.S. at 467-469.

from a defendant, so long as it does not violate the Fifth Amendment in doing so—which it does not, when the defendant is not subjected to any police compulsion and chooses not to invoke the privilege. See *Tucker*, 417 U.S. at 449-450. And in any event, evidence about a defendant's out-of-court silence does not structurally reduce the prosecution's burden of proof. By comparison, permitting an adverse inference based on a defendant's failure to testify at trial implies that the defendant is unable to rebut or explain any part of the prosecution's case, thereby lessening the prosecution's burden of proof with respect to each piece of evidence it presents. See *Mitchell*, 526 U.S. at 330; *Griffin*, 380 U.S. at 613-614.

Petitioner is also incorrect in suggesting (Br. 21-23) that permitting an adverse inference from silence would threaten "the innocent [with] unjust conviction." The *Griffin* rule is designed to protect defendants from the risk that jurors will "too readily assume" that an invocation of the Fifth Amendment admits the possibility of incrimination, thereby indicating guilt, when in fact invocation has little relation to guilt or innocence. *Mitchell*, 526 U.S. at 329. For suspects who invoke the privilege in a noncustodial situation, the same principle would apply.

By contrast, because mid-interview silence reflects a defendant's choice not to stand on his privilege and also not to answer a particular question, it is potentially probative evidence of the defendant's state of mind. "Failure to contest an assertion * * * is considered evidence of acquiescence * * * if it would have been natural under the circumstances to object to the assertion in question." *United States* v. *Hale*, 422 U.S. 171, 176 (1975) (citation omitted). That is particularly so

when a suspect voluntarily answers many other questions, but remains silent in response to a particular question: "[j]ust as flight to avoid apprehension can reflect consciousness of guilt, so a sudden silence can reflect a suspect's consciousness that he has dug himself into a hole and cannot see an exit." *Bland* v. *Hardy*, 672 F.3d 445, 449 (7th Cir. 2012), cert. denied, No. 12-594, 2013 WL 1091775 (Mar. 18, 2013). Because this evidence is potentially probative and not an exercise of the Fifth Amendment privilege, evidentiary rules provide adequate protection against those instances in which the defendant's mid-interview silence is less probative than prejudicial. See Fed. R. Evid. 401-403. To categorically prohibit the use of mid-interview silence, moreover, would unjustifiably place the prosecution at a disadvantage by allowing admission only of the portions of an interview in which the defendant answered questions, perhaps exculpating himself, to the exclusion of portions that may indicate a different version of events. See *United States* v. *Robinson*, 485 U.S. 25, 32 (1988).

Petitioner also argues (Br. 18) that the use of mid-interview silence at trial would cause the defendant to "feel extra pressure to take the stand to offer an alternative explanation for his silence." The Court has recognized, however, that in every criminal case "there are undoubted pressures—generated by the strength of the government's case against him—pushing the criminal defendant to testify." *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 287 (1998). But unless the government's case is based on testimony obtained through compulsion—which is not the case in petitioner's situation—the pressure to testify itself does not "constitute 'compulsion' for Fifth Amendment purposes." *Ibid.*

D. The Prosecution's Use Of Petitioner's Mid-Interview Silence Did Not Violate His Fifth Amendment Rights

1. In this case, the prosecution's substantive use of petitioner's silence in response to a single question during his noncustodial interview did not violate the Fifth Amendment. In order to exercise his Fifth Amendment right to decline to answer questions and insulate that refusal from being used against him as evidence of guilt, petitioner was required to affirmatively invoke his Fifth Amendment. There can be no question that he did not do so here.

Rather than indicating at any time that he preferred not to cooperate with the police, petitioner agreed to accompany officers to the station and to answer questions. He was not subjected to any police threats that might have induced him to speak or to forgo the privilege. See p. 25, *supra*. Petitioner voluntarily answered questions about the victims and his relationship with them. When asked whether ballistics evidence would match his father's shotgun to the shells found at the scene, petitioner did not say anything—rather, he "[l]ooked down at the floor, shuffled his feet, * * * [and] began to tighten up." J.A. 18. The conversation then moved on, and petitioner resumed answering questions, thus confirming that he did not wish to stand on his rights. Indeed, petitioner likely believed that continuing to answer questions was advantageous to him, as he provided an explanation of his whereabouts when the murder occurred. *Ibid.* In these circumstances, petitioner clearly failed to invoke the privilege. Cf. *Thompkins*, 130 S. Ct. at 2260.

2. Because petitioner did not invoke the Fifth Amendment, the prosecution's use of petitioner's silence as evidence of guilt at trial was constitutional.

As an initial matter, Sergeant Elliott's testimony about petitioner's physical movements "after" he failed to respond to the ballistics question, J.A. 17, would have been admissible whether or not petitioner's silence itself was admissible. The statement that petitioner looked down and acted nervous, J.A. 18, is evidence of petitioner's demeanor—the outward physical manifestations of petitioner's mental state—that is not testimony and therefore does not implicate his Fifth Amendment rights. See *Muniz*, 496 U.S. at 589; *United States* v. *Velarde-Gomez*, 269 F.3d 1023, 1031 (9th Cir. 2001) (evidence of physical reaction to questioning does not necessarily implicate the Fifth Amendment).

In all events, the prosecution's express references to petitioner's silence—Sergeant Elliott's testimony that petitioner "did not answer" the ballistics question, J.A. 17, and the prosecutor's argument to the jury that petitioner's silence was inconsistent with innocence, Pet. App. 18a—were admissible because petitioner failed to invoke the Fifth Amendment in response to the question. Indeed, this case exemplifies the potential probative value in a suspect's mid-interview silence: petitioner failed to answer a single question in the middle of a 58-minute interview, looking uncomfortable after the question was asked but resuming his answers immediately upon being asked another question. That sequence of events (though open to multiple interpretations) raised a permissible inference that petitioner knew that an honest answer to the question would not serve him well, but he lacked the time or ingenuity to fabricate an exculpatory explanation. Given that petitioner could have, but did not, invoke his right against self-incrimination, the Fifth Amendment does not require the prosecution to forgo using probative evidence creat-

ed as a result of petitioner's voluntary interaction with the police.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Petitioner,

v.

TEXAS,

Respondent.

On Writ Of Certiorari
To The Texas Court Of Criminal Appeals

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OTHER AUTHORITIES

17 C.F.R. § 240.10b-5 ..... 15, 16, 23

Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees; As Sentencing Rules Stiffen, KPMG Axes Tax Partners, Won't Pay Their Legal Costs; What 'Cooperation' Entails*, Wall St. J., June 4, 2004..... 10

Kurt Eichenwald, *Enron's Many Strands: The Accountants; Miscues, Missteps and the Fall of Andersen*, N.Y. Times, May 8, 2002 10

Benjamin Franklin, *The Autobiography of Benjamin Franklin* 27

Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 Am. Crim. L. Rev. 9 (2005)..... 20, 25

Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311 (2007)..... 10, 20

Joseph A Grundfest, Op-Ed., *Over Before It Started*, N.Y. Times, June 14, 2005..... 10

The Heritage Foundation & the Nat'l Assoc. of Crim. Def. Lawyers, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement In Federal Law* (2010)..... 17

Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 L. & Human Behavior 211 (2004)..... 13

TABLE OF AUTHORITIES
(continued)

Page(s)

Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 Buff. Crim. L. Rev. 165 (2004) 20

Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 Hous. L. Rev. 591 (2006) ..... *passim*

Jessica Pettit et al., *Obstruction of Justice*, 49 Am. Crim. L. Rev. 1037 (2012) 19

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Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. Legis. 129 (2004) 19

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INTEREST OF *AMICUS CURIAE*

The American Board of Criminal Lawyers ("ABCL") was founded in 1978 as a national legal honorary society for highly accomplished criminal defense trial lawyers. Admission is by invitation only and requires both substantial, successful major felony trial experience and exceptional recommendations from distinguished jurists and current Fellows attesting to the candidate's high ethics and litigation skills. ABCL Fellows have extensive experience in both white-collar and other complex criminal cases. The primary goal of ABCL is the preservation and free exercise of fundamental freedoms for all those accused of criminal conduct.

Allowing a prosecutor to comment on silence in response to government questioning or to use it as substantive evidence of guilt unconstitutionally penalizes the exercise of an individual's Fifth Amendment right to remain silent. *Amicus* submits this brief to underscore the particular costs imposed by such a constitutional violation and its potential for unfair abuse in white-collar criminal cases.

SUMMARY OF ARGUMENT

The Fifth Amendment secures to individuals a right to remain silent to protect them from the compelled self-incrimination it bars. Prosecutorial

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* Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* has made a monetary contribution to the preparation or submission of this brief. The parties' letters of consent to the filing of this brief are on file with the Clerk.

comment on pre-arrest, pre-*Miranda* silence and its use as substantive evidence of guilt strip away this protection by using individuals' exercise of the right against them, thus imposing an unconstitutional penalty on the exercise of that right. The harsh costs and Catch-22 choice imposed by that penalty on individuals targeted in white-collar investigations underscore the problem with the rule adopted by the court below.

To begin with, there is no doubt that the right to remain silent applies during a government investigation. The question is whether the government's use of an individual's silence as substantive evidence against him penalizes exercise of the right such that it no longer affords the individual the protection from compelled self-incrimination the Fifth Amendment demands. When looking at the particular category of white-collar cases, the enormity of the costs imposed by the rule below is apparent in two respects.

First, using silence as evidence of guilt increases the likelihood of prosecution and conviction. The costs for each are particularly high in the white-collar context. For one thing, the scope of white-collar investigations increases the threat, as a variety of agencies can engage in multiple interviews with a defendant and his colleagues to manufacture more "guilt-by-silence" evidence. For another, the harm to the defendant arises long before conviction, because even an indictment can create reputational and financial harm from which he cannot recover, regardless of the ultimate outcome in a trial. Indeed, the implication of individuals in white-collar crimes can lead to severe, even disastrous, consequences for

not only the individual targeted, but also for companies and stakeholders.

Second, the rule adopted by the court below also places particular pressure on targets in white-collar cases to risk self-incrimination by speaking to investigators. Such individuals, although sophisticated in business matters, often have little experience with the criminal justice system and could be more easily intimidated, especially if told by the investigator that silence could be used against them. However, even for the innocent, speaking carries great risks in white-collar cases given the complexity of the facts and breadth and vagueness of the statutes and regulations involved. Whether they choose to speak or remain silent, then, individuals targeted in white-collar investigations are left with no choice but to provide the government potentially incriminating evidence against themselves and are thus bereft of the protection against compelled self-incrimination provided by an unfettered right to remain silent.

Furthermore, using silence during government questioning as evidence of guilt subverts the basic principle—also protected by the Fifth Amendment—that the government alone must shoulder the burden to prove its case. The rule adopted by the court below effectively requires an individual—either through his speaking or his silence—to aid the government in building a case against himself. The length and breadth of white-collar investigations increases the likelihood of abuse of guilt-by-silence evidence, and investigators can further extract assistance based on multiple threats to use an individual's silence against him. The generally ambiguous nature of silence,

especially given the numerous reasons for remaining silent in white-collar investigations, only sharpens the unfairness of providing this tool to the government for bolstering or even manufacturing a case against an individual.

ARGUMENT

I. USING SILENCE DURING GOVERNMENT QUESTIONING AS SUBSTANTIVE EVIDENCE WOULD UNCONSTITUTIONALLY PENALIZE WHITE-COLLAR SUSPECTS' EXERCISE OF THE RIGHT TO REMAIN SILENT.

A. Using Silence During Government Questioning As Substantive Evidence Of Guilt Unconstitutionally Penalizes A Suspect's Exercise Of The Right To Remain Silent.

The Fifth Amendment prohibits the government from compelling a person "to be a witness against himself." U.S. Const. amend. V. To guarantee individuals a safe harbor when in danger of self-incrimination, the provision secures against government infringement "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *see also Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citing *Malloy*). Put simply, if an individual "has reasonable cause to apprehend danger [of self-incrimination] from a direct answer" to a government agent's question, he has a constitutional right not to answer it. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

To preserve the protection against compelled self-incrimination this constitutional right to remain silent provides, this Court has recognized that government conduct that erodes the right's protection by penalizing its exercise is a form of compelled self-incrimination prohibited by the Fifth Amendment. In *Griffin v. California*, 380 U.S. 609 (1965), the Court recognized prosecutorial comment on the defendant's silence as one such unconstitutional penalty. Allowing a prosecutor to comment on the defendant's silence at trial impermissibly "cuts down on the privilege by making its assertion costly." *Id.* at 614. Indeed, under the rule rejected in *Griffin*, a defendant who opted for the safe harbor of silence to avoid possible self-incrimination would find that, perversely, doing so provided the government with evidence it could use to incriminate him. Not every burden on the exercise of Fifth Amendment rights is a constitutionally impermissible one. But *Griffin* makes clear that treating an individual's silence as a confession of guilt constitutes an unconstitutional penalty on the exercise of the right to remain silent that strips away the protection against compelled self-incrimination it is supposed to afford. *See also Slochower v. Bd. of Higher Educ. of New York City*, 350 U.S. 551, 557 (1956) ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.").

This critical protection from compelled self-incrimination extends beyond the courtroom; an individual possesses the same constitutional right to remain silent during an investigation as he does at trial. *See Kastigar v. United States*, 406 U.S. 441,

444 (1972); *Watkins v. United States*, 354 U.S. 178, 188 (1957) ("The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves."). The right's availability springs from potential the danger of self-incrimination, independent of the context in which the government asks the questions. *See Hoffman*, 341 U.S. at 486. Recognizing this fact, this Court has protected the right to remain silent, *e.g.*, during a noncustodial investigation by a state attorney general's office, *Garrity v. New Jersey*, 385 U.S. 493, 494 (1967); during noncustodial questioning by a U.S. Senate investigating committee, *Slochower*, 350 U.S. at 553, 557–59; and even in response to a government request for information prior to any investigation at all, *Marchetti v. United States*, 390 U.S. 39, 60 (1968).

Accordingly, constitutional restrictions on government action inconsistent with the right to remain silent must also go beyond the courtroom. The penalty imposed by allowing the prosecution to comment on silence and use it as substantive evidence of guilt cancels out the right's protection against compelled self-incrimination whether the silence comes in the form of a refusal to take the stand at trial or a refusal to answer questions posed by government agents in an investigation. Under the rule below, if the individual questioned by government agents chooses to rely on his Fifth Amendment right not to answer them, he is nevertheless forced to "give" them his silence, which the prosecution can use as substantive evidence to more easily secure an arrest, indictment, or conviction. Knowing his silence can be used against

him also pressures the individual to speak, either during the investigation or later at trial—and even innocent parties risk self-incrimination or exposure to cover-up crimes like obstruction or perjury by doing so. Either way, the government impermissibly conscripts the individual into helping it "shoulder the ... load" to prove a case against him. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964); *see also Portuondo v. Agard*, 529 U.S. 61, 67 (2000) (referring to "[t]he defendant's right to hold the prosecution to proving its case without his assistance"). In sum, if an individual's silence during a criminal investigation can be used substantively against him later, it unconstitutionally blocks the safe harbor the Fifth Amendment requires to protect him from compelled self-incrimination.

B. Using Silence During Government Questioning As Substantive Evidence Of Guilt Would Impose Wide-Ranging And Unfair Costs On Targets Of White-Collar Investigations.

While the use of silence during government questioning as evidence of guilt would place an unconstitutional penalty on the right to remain silent for defendants generally, the particular costs imposed by that penalty in white-collar cases underscore the problem with the rule adopted by the court below. In all cases, that rule would allow the government to use an individual's own silence during an investigation to later incriminate the individual, both by introducing his silence as substantive evidence of guilt and by telling the jury to draw an adverse inference from that evidence. The availability of such evidence and argument could increase the likelihood

of not just conviction, but also indictment or arrest (for which the silence might provide probable cause). When it comes to white-collar investigations, these legal consequences can quickly generate permanent, devastating, and far-reaching costs. This makes allowing prosecutors to use silence against targeted individuals in white-collar investigations an especially serious constitutional violation.

First, the corporate context of white-collar crimes—*e.g.*, insider trading, accounting fraud, securities fraud, banking crimes, bribery, price-fixing, and extortion—means that the costs of being implicated in a crime extend far beyond the targeted individual. When an officer or employee of a company is accused or convicted of criminal activity involving or implicating the firm, the financial consequences to the business and its stakeholders can be substantial. Values of stock or ownership interests plummet, creditworthiness takes a hit, access to capital markets is threatened, and current and potential customers look elsewhere. The costs of hiring lawyers to combat the allegations, and public relations firms to mitigate damage to reputation and goodwill, are also significant. As a result, investors, customers, advertisers, officers, employees, and other stakeholders (including and especially the targeted individuals) are all subjected to financial and reputational harm. Under the rule below, all of these wide-ranging consequences (for the individual, other officers or employees, or the company itself) would fall in part on the shoulders of any individual who remains silent during a white-collar investigation; simply by attempting to avail himself of the protection against compelled self-incrimination the right to silence is supposed to secure, the individual

could in fact provide enough "evidence" against himself to trigger financial and reputational ruin for everyone involved.

Second, these potential costs of refusing to answer questions by the government often arise early on in white-collar criminal investigations. Again, the government could use such guilt-by-silence evidence not only to support conviction, but also as probable cause for arrest or indictment. And even suspicion of criminal activity connected with a company can cause all of the just-discussed consequences for its investors, officers, employees, and other stakeholders.

In fact, the collateral consequences of implication in criminal activity can arise as soon as a criminal investigation becomes public: "[F]inancial and business markets react to news of the investigation—and to leaks regarding its progress. Investors sell, shareholders sue, clients withdraw, advertisers bail, and targeted firms soon encounter financial difficulties." Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 Hous. L. Rev. 591, 594 (2006). For instance, between the time the investigation of Martha Stewart started and her conviction, her company lost 17 percent in revenues and 68.5 percent in earnings from publications. *Id.* Shareholders also filed thirteen suits against her and her company, and Stewart had to step down as CEO and Chairwoman even before she went to trial. *Id.* at 595.

The demise of Arthur Andersen was even more striking. Before its criminal trial even started, Enron's accounting firm was "all but dead." Kurt Eichenwald, *Enron's Many Strands: The*

Accountants; Miscues, Missteps and the Fall of Andersen, N.Y. Times, May 8, 2002, at C1. After massive losses of goodwill, clients, and revenue as a result of its indictment, the firm's eventual victory in the Supreme Court was pyrrhic; as one op-ed put it, "Andersen was destroyed when it was indicted. No exoneration at trial and no ruling by the Supreme Court will cause it to rise, Lazarus-like, from the dead." Joseph A Grundfest, Op-Ed., *Over Before It Started*, N.Y. Times, June 14, 2005, at A23. Of course, nearly everyone connected to Arthur Anderson took substantial and permanent hits to reputation, finances, or both.

Third, targeted individuals already face other penalties, also effectively imposed by the government, for remaining silent during an investigation. While state practices vary, federal agencies place a great deal of importance on a company's perceived overall cooperation with an investigation when determining whether to pursue criminal or civil charges. *See, e.g.*, U.S. Attorney's Manual, tit. 9, ch. 9–28.700. Part of this cooperation historically included substantial pressure to "withdraw financial support from embattled employees," including by firing them and refusing to pay their legal fees. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 336 (2007); *see also* Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees; As Sentencing Rules Stiffen, KPMG Axes Tax Partners, Won't Pay Their Legal Costs; What 'Cooperation' Entails*, Wall St. J., June 4, 2004, at A1. Despite current stated DOJ policy restrictions on these practices after the KPMG debacle, the pressure

still remains, though prosecutors and regulators exercise it more subtly than before. This withdrawal of support by the company only adds to the costs of remaining silent while under investigation by the government.

Fourth, the nature of white-collar criminal investigations increases the probability that the government will be able to acquire and use guilt-by-silence evidence to arrest, indict, or convict targeted individuals or corporations. To begin with, investigators may approach an individual at the office or at home with little or no notice and, with no mention of *Miranda*, pepper the individual with questions. Given the complex conduct and transactions that are generally the subject of white-collar investigations, *see* Moohr, *supra*, at 596, targeted individuals would likely consider refusing to answer merely based on surprise and ill-preparedness to answer complex questions. The prevalence of this type of situation in white-collar investigations would give the government a better-than-usual chance of securing individuals' silence as evidence to use against them later.

Moreover, the government will likely have numerous opportunities to procure guilt-by-silence evidence it can use against both the company and targeted individuals. Unwinding of the complicated transactions and conduct prevalent in modern business requires lots of time, and this complexity gives investigators reason to interview a wide range of potentially connected individuals, often on multiple occasions. In addition, overlapping jurisdiction among federal and even state agencies is commonplace. For example, Martha Stewart,

investigated for a relatively simple and isolated case of insider trading, was interviewed twice by three different sets of federal agents from the FBI, the SEC, and the U.S. Attorney's office. *Id.* at 593. For allegations of crimes of broader scope and greater complexity, the number of interviews and persons of interest only grows.

At bottom, in a garden-variety criminal trial, the prosecutor might point to the accused's refusal to answer one question in one interview as evidence of his guilt. Given the scope of a white-collar investigation, the prosecutor would likely be able to bludgeon a defendant with multiple pre-arrest, pre-*Miranda* interviews in which the defendant was silent about multiple issues (and thus, according to the prosecution, likely guilty). It could also offer up the silence of numerous other officers or employees as additional evidence of criminal activity. In short, the threat of one piece of guilt-by-silence evidence in a typical case becomes the threat of a stack of such evidence (and associated adverse inferences) in a white-collar prosecution.

C. The Threat Of Use Of Silence As Substantive Evidence Of Guilt Would Pressure Individuals To Speak Despite Substantial Risks Of Incrimination.

By allowing the prosecution to use an individual's silence as incriminating evidence rather than protecting it as a safe harbor against potential self-incrimination (as the Fifth Amendment requires), the rule adopted below pressures the individual to risk incriminating himself by speaking instead. If exercising his right to silence no longer protects him

from providing evidence against himself (and causing the just discussed consequences), he might ask, why not try to talk his way out of it? The short answer is, of course, that this choice is no safer. The right to remain silent exists precisely because speaking risks self-incrimination, even for the innocent. *See Ohio v. Reiner*, 532 U.S. 17, 21 (2001) ("[T]ruthful responses of an innocent witness ... may provide the government with incriminating evidence from the speaker's own mouth."). Thus, under the rule below, speaking is merely the second of two forms of potential self-incrimination available to an individual questioned by investigators: He can remain silent, allowing the government to use the silence against him, or he can give in to the pressure that threat creates and risk self-incrimination by speaking. Either way, every time investigators question an individual, they force him to risk self-incrimination.

Individuals targeted in white-collar investigations may be particularly tempted to give in to this pressure to speak. Such individuals often have no personal experience with the criminal justice system and are overconfident based on their education and business expertise. Under the threat of having their silence used against them (and especially given the devastating consequences of prosecution), they are therefore more likely to speak to investigators than are street-crime suspects who may have had repeated negative encounters with law enforcement. *See* Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 L. & Human Behavior 211, 212 (2004) ("[Researchers] found that people who have no prior felony record are far more likely to waive their rights than are those with criminal justice 'experience.'"). Cases like those

of Roger Clemens and Martha Stewart already evince the troubling yet common belief that exercising the right to remain silent is a worse decision than waiving it and "talking your way out of it."

That belief is as misguided in white-collar criminal investigations as in any other. In a white-collar investigation, speaking to investigators is akin to navigating a minefield of potential self-incrimination, even for parties innocent of the crime under investigation. For one thing, the facts in these cases can be extraordinarily complicated. Modern businesses are complex entities, often encompassing multiple divisions, utilizing decentralized decision making, and engaging in increasingly elaborate transactions—both domestic and cross-border. The conduct and transactions at issue may involve many people and span decades, geographic locations, and massive amounts of physical and electronic material. For another, white-collar criminal statutes and regulations capture an expansive yet vague range of conduct and transactions. In such circumstances, a targeted individual cannot know, correctly recall, or even locate every detail of the relevant conduct and transactions, much less understand the full range of legal ramifications.

Aware of these complexities and the potential for self-incrimination they create, attorneys who handle white-collar investigations generally advise their clients not to speak to investigators, especially before consultation with both company and personal attorneys and careful review of the documents, deals, conduct, or events in question. But under the rule below, not speaking could be just as incriminating, making individuals less likely to heed the advice.

Those individuals risk self-incrimination either by getting the facts wrong, unwittingly misleading investigators, or even giving a false exculpatory "no" simply because the individual is not adequately prepared. Specifically, these common mistakes can lead to two equally costly consequences: (1) self-incrimination with respect to the crime under investigation, or (2) simultaneous creation of and self-incrimination with respect to a so-called "cover-up" crime like obstruction or false statements to government agents.

1. The first risk—that a targeted individual will inadvertently incriminate himself with respect to the crime under investigation—is a function of mixing the complexities of the typical firm with the expansive and often indeterminate reach of many white-collar statutes and regulations. Generally speaking, federal white-collar criminal laws "use broad, undefined terms that can be applied to a wide range of conduct." Moohr, *supra*, at 604. For instance, most types of securities fraud, including insider trading, are generally charged under a single provision, section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the SEC rule promulgated thereunder, Rule 10b-5, 17 C.F.R. § 240.10b-5. Section 10(b) broadly makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ... [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of" SEC rules. 15 U.S.C. § 78j(b). Rule 10b-5 is equally expansive in scope. *See* 17 C.F.R. § 240.10b-5. Moreover, both the

statute and the rule leave it to the courts to define the key terms, including "deceptive device," and judicial interpretations have both varied by jurisdiction and changed over time.

The mail and wire fraud statutes are similarly capacious. *See* 18 U.S.C. §§ 1341, 1343, 1346. The mail fraud statute was initially passed simply to "secur[e] the integrity of the United States Postal Service." William M. Sloan, *Mail and Wire Fraud*, 48 Am. Crim. L. Rev. 905, 906 (2011). Over time, though, the government has used that statute and the similar wire fraud statute to capture an increasingly wide range of conduct, including fraud of almost any kind, blackmail, money laundering, and RICO violations. *Id.* at 906–07. These statutes are particularly dangerous traps because prosecutors use them as a "stopgap device" to charge individuals for "new" types of fraud even before Congress has passed a law to criminalize the specific conduct in question. *See United States v. Maze*, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting). Prosecutors famously used one mail and wire fraud statute in particular, the honest-services statute, 18 U.S.C. § 1346, as a catchall for any scheme or conduct they could not otherwise charge until this Court narrowed the statute's reach to bribery and kickbacks in *Skilling v. United States*, 130 S. Ct. 2896, 2932–33 (2010). *See also id.* at 2935 (Scalia, J., concurring) (reasoning that the honest-services statute is unconstitutionally vague).

It gets even worse. If these broad statutes do not cast a wide enough net, a charge of conspiracy or aiding and abetting often will. *See, e.g.*, 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 2 (aiding and abetting).

An individual may be charged with conspiracy to commit an underlying white-collar crime even without being present or engaging in the conduct at issue. *See, e.g., Pinkerton v. United States*, 328 U.S. 640, 645–47 (1946). Even absent a conspiracy, an individual may be accused of aiding and abetting if the prosecution can assert that he "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishes to bring about, [and] that he [sought] by his action to make it succeed." *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). In SEC enforcement actions, such liability may attach even if the defendant was not a proximate cause of the securities fraud at issue. *See SEC v. Apuzzo*, 689 F.3d 204, (2d Cir. 2012) (noting that the federal statute proscribing aiding and abetting securities fraud "was passed ... precisely to allow the SEC to pursue aiders and abettors who ... were not the themselves involved in the making of the false statements that proximately caused the plaintiffs' injuries").

In sum, these sweeping statutes governing white-collar criminal law "often prohibit such exceedingly broad ranges of conduct, in language that is vague and imprecise, that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish." The Heritage Foundation & the Nat'l Assoc. of Crim. Def. Lawyers, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement In Federal Law* 9 (2010). And the conduct they criminalize is variable by jurisdiction and over time. This makes speaking to investigators risky. It is almost impossible for a targeted individual unfamiliar with the intricacies of such laws to know whether something he says to

government investigators could incriminate him, other employees, or his company. Predicting the effect of a particular statement becomes even trickier when prosecutors charge individuals under novel theories that nevertheless could fit within the vague language of provisions like section 10(b), as the prosecution did in Martha Stewart's case. Moohr, *supra*, at 602–07 (discussing the prosecution's "novel" theory that Stewart fraudulently misled investors in her own company by maintaining her innocence with regards to personal, low-value trades on another company's stock). And again, indictment alone is enough to cause significant and permanent financial and reputational consequences, even if a court later throws out the charge. The rule adopted below, however, by treating an individual's silence as evidence against him, pressures a targeted individual to venture into this quagmire of potential white-collar criminal (and parallel civil) liability. In this way, the rule would further erode the protection against compelled self-incrimination.

2. Beyond possible incrimination with respect to the crime under investigation, individuals targeted in white-collar investigations risk an even more treacherous pitfall by speaking to investigators: exposure to liability for cover-up crimes. Obstruction and false statements, the cover-up offenses relevant during criminal investigations, "capture a wide range of conduct," Moohr, *supra*, at 608, making them effective traps for the unwary individual targeted in a white-collar criminal investigation. The main obstruction statutes provide for criminal punishment of "[w]hoever corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede" justice. 18 U.S.C. § 1503; *id.* § 1505. This is

language susceptible to wide application, particularly given that an individual need only "endeavor" to obstruct justice. *See* Jessica Pettit et al., *Obstruction of Justice*, 49 Am. Crim. L. Rev. 1037, 1046–47 (2012). Even the mens rea element, "corruptly," has been watered down, *see* Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. Legis. 129, 141–66 (2004), and its meaning varies significantly from circuit to circuit, *see* Pettit, *supra*, at 1044–46.

The general false statements statute is even broader, covering anyone who "knowingly and willfully ... falsifies, conceals, or covers up by any trick, scheme, or device a material fact" or who "makes any materially false, fictitious, or fraudulent statement or representation." 18 U.S.C. § 1001(a)(1)–(2). To expose himself to false statements liability, a suspect need not know about or intend to cover up any particular crime; it is enough that he knowingly and willfully conceals information, even if for perfectly understandable and legitimate reasons. Conviction for a false statement can even be secured based on a simple false exculpatory "no" that "misled no one." *Brogan v. United States*, 522 U.S. 398, 410 (1998) (Ginsburg, J., concurring).

These statutes have proven particularly useful for prosecutors looking to improve the probability of a conviction in a given case: "It is increasingly the statements made during an investigation, rather than the alleged misconduct that triggered the investigation, that form the basis for criminal liability." Griffin, *supra*, at 333. Such crimes "are typically cheaper to prosecute, more comprehensible

to the jury, and less subject to subtle nuances in proof" than underlying cases of, *e.g.*, insider trading or accounting fraud. Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 Am. Crim. L. Rev. 9, 36–37 (2005). Thus, if the prosecution is having trouble gathering enough evidence to charge the accounting or securities fraud under investigation, it can instead look to the statements of targeted individuals during the investigation for lies, misstatements, or concealment on which to base charges for false statements or obstruction instead. For instance, Martha Stewart was never charged with the insider trading that spurred the investigation; she was instead charged with obstruction and making false statements, and she was convicted on four counts of obstruction. *See* Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 Buff. Crim. L. Rev. 165, 176–77 (2004).

Innocent targets are no safer. As Justice Ginsburg pointed out in *Brogan*, the false statements statute could "be used to 'escalate completely innocent conduct into a felony.'" 522 U.S. at 411. An individual who fears the substantial consequences of prosecution for white-collar crimes could make punishable false statements or be charged with obstruction even if the conduct or transaction he covers up is not a crime at all. Or, the individual could lie or conceal information for other reasons: protecting what he views as confidential or privileged information (whether it is or not), a sense of loyalty to the company or associates, or simple mistrust of investigators based on prior experience with regulators. None of these scenarios involve any

underlying crime; all make the targeted individual vulnerable to cover-up charges.

Again, knowing these substantial consequences lie in wait for those who speak to investigators in a white-collar criminal investigation, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to [investigators] under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). But under the rule fashioned by the court below, taking that advice would provide the prosecution with substantive evidence against the targeted individual that could adversely affect him both in the charging decision and at trial. In short, if the prosecution can comment on a targeted individual's pre-arrest, pre-*Miranda* silence and use it as substantive evidence of guilt, the individual truly has no good option left; whether he answers an investigator's question or remains silent, he is forced to help the government build a case against him, subjecting himself and others to the severe and far-reaching consequences of white-collar prosecutions.

II. USING SILENCE DURING GOVERNMENT QUESTIONING AS SUBSTANTIVE EVIDENCE OF GUILT WOULD UPSET THE STATE-INDIVIDUAL BALANCE AND ESTABLISH A SYSTEM RIPE FOR ABUSE IN WHITE-COLLAR INVESTIGATIONS.

It is a bedrock principle of our criminal law that an individual remains innocent unless and until the government proves his guilt beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 363–64 (1970). The Fifth Amendment's bar on compelled

self-incrimination does its part to further this principle by keeping the government from enlisting the defendant to shoulder any part of this burden; every defendant has the "right to hold the prosecution to proving its case without his assistance." *Portuondo*, 529 U.S. at 67; *see also Murphy*, 378 U.S. at 55 (listing as a "fundamental value" protected by the Fifth Amendment "our sense of fair play which dictates ... 'requiring the government in its contest with the individual to shoulder the entire load'"). Allowing prosecutors to comment on pre-arrest, pre-*Miranda* silence or to use it as substantive evidence against an individual would gut this right: "The result would be to enlist the defendant as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power." *Mitchell v. United States*, 526 U.S. 314, 325 (1999). In white-collar criminal investigations, it would further provide the prosecution with an unfair structural advantage ripe for abuse.

First consider a white-collar investigation in which the government cannot rely on using a targeted individual's silence as substantive evidence later on: In such an investigation, the government has to put in the work to discover the evidence it needs, if it exists, to prove each element of the crime in question. If it suspects a particular individual has engaged in securities fraud, for example, the prosecution may subpoena documents and interview anyone it wants to gather evidence to support its belief that the suspect employed a "deceptive device or contrivance"

to defraud investors in violation of Rule 10(b). 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. The government may even interview the suspect in this quest for evidence. But in this scenario, the suspect retains the right to make the government find any incriminating evidence without his help—a right he can exercise simply by remaining silent when investigators ask him questions. His choice here is simple: speak to investigators and risk incrimination, or remain silent and force the government to prove its case on its own.

That calculus unfairly shifts in the government's favor if a prosecutor can use the suspect's silence during the investigation as substantive evidence against him in the charging decision or at trial. Given the same scenario, the suspect questioned by the government would have no choice but to provide substantive evidence against himself. Let us say the government thinks the suspect helped further a pump-and-dump scheme. When an investigator asks about particular conduct—"Did you post this message online urging investors to purchase Company X stock?"—the suspect may still refuse to answer, thus avoiding the risk of incurring cover-up charges, *e.g.*, with a false exculpatory "no." But even by remaining silent, the suspect provides substantive evidence from which the government can ask a grand or petit jury to infer guilt. No longer does the suspect have the choice to make the government prove its case by other means than acquiring evidence from the suspect himself; whatever he does, he is forced to drive a nail into his own coffin. And the fact that his silence can be used against him adds government-created pressure to make the equally dangerous choice of speaking to the investigators—risking self-

incrimination with respect to the underlying securities fraud or cover-up crimes newly created by his statements.

This new advantage for government investigators would hold true in any criminal investigation. The wider scope and longer timeframe of white-collar investigations, however, would likely turn an already significant advantage into an abusive tactic. Again, targeted individuals in white-collar investigations can often expect to face multiple, lengthy interviews conducted by more than one government agency (*e.g.*, FBI, SEC, DOJ, state attorneys general). This provides the government the opportunity to ask the same or similar questions numerous times throughout the investigation. If the individual relies on his right to remain silent, he is effectively forced to improve the government's case against him each time he simply chooses not to respond to a question. For example, simply by asking the right questions, the government could generate a significant quantity of circumstantial guilt-by-silence proof of the *mens rea* element of white-collar crimes. On the other hand, if the specter of a mountain of guilt-by-silence evidence pressures the individual to answer these questions, he risks exposing himself to count after count of obstruction or false statements with each question he answers.

This rule could significantly and unfairly shift part of the prosecution's burden in a case to the defendant. Under this rule, the government need only think up incriminating questions and ask them; even if it fails to elicit answers, it would still further its case with guilt-by-silence evidence. And the more questions asked, the better the chances of indictment

or conviction. There is little reason to doubt that prosecutors and law enforcement agents will seize every opportunity to conscript the suspect into building the prosecution's case against him in this way.

Threatening to use a suspect's silence in a white-collar investigation as substantive evidence against him would be an especially troubling tactic for manufacturing cover-up offenses during questioning. Again, the government has increasingly turned to these crimes to secure convictions because they are generally much cheaper and simpler to prove and explain than are complex accounting or securities fraud. Green, *supra*, at 36–37. The rule adopted by the court below would give prosecutors a seductively simple and effective way to create cover-up liability. Investigators could ramp up the pressure to answer their questions by reminding a targeted individual each time he fails to answer that the prosecution can and will tell the jury to infer guilt from his silence—*e.g.*, "Surely an individual with nothing to hide would have cooperated fully with investigators rather than clamming up when investigators asked the tough questions." Then, when the individual caves, speaks up, and slips up, the prosecution can charge a cover-up offense. An individual—particularly with no lawyer present—will almost inevitably make some chargeable or damaging statement by speaking up during a white-collar investigation; the transactions and conduct of a modern firm are simply too complex for an individual to provide a fully complete and detailed account, and even innocent individuals will be tempted to conceal or lie at some point out of fear of the wide-ranging potential consequences of indictment or prosecution. *See Brogan*, 522 U.S. at

410–11 (Ginsburg, J., concurring). And the prolonged timeline, broad scope, and overlapping jurisdiction inherent in a white-collar criminal investigation would only exacerbate the potential for abuse of this tactic.

The government may use the same threat to start a cascade of cooperation. Investigators could extract assistance based on threats to use an individual's silence against him substantively. Once they flip one individual, they can use any evidence procured to target another individual, and simply rinse and repeat. In this way, investigators can pressure an entire organization into cooperation based largely on threats to use individuals' constitutionally protected silence against them.

All of these tactics are unfair and abusive on their own because they force individuals to help the government prove its case against them. The unfairness comes into sharper relief when one considers that an individual's silence during government questioning—the key cog the government uses as either threat or evidence—is insolubly ambiguous, not probative of guilt. To begin with, it has long been a basic principle that silence is valued and honorable, *see, e.g.*, Benjamin Franklin, *The Autobiography of Benjamin Franklin* 214–15 (listing silence as a virtue), not indicia of guilt. More specifically, an individual has plenty of innocent reasons to refuse to answer questions in a criminal investigation, including suspicion of government agents, memory deficits, righteous indignation, embarrassment, or fear of making mistaken statements. *See* Pet'r's Br. at 21–23. On top of these reasons, company or personal lawyers—well aware of

the complexities of modern firms and white-collar criminal law, *see supra* p. 10, and the staggering consequences of implication in criminal activity—will advise a businessperson not to answer any questions, especially if caught unprepared by an investigator or without the lawyers present. An individual could even refuse to answer questions based simply on his misunderstanding of an *Upjohn* warning from company lawyers, *i.e.*, that his interview with company lawyers was "privileged" and he is not supposed to talk to law enforcement about the subject matter discussed with the lawyers. Even without a specific warning, many businesspersons deal with in-house counsel and compliance officers on a regular basis and may instinctively refer investigators to these people rather than talking to investigators themselves. There are, of course, countervailing pressures on officers and employees to speak. *See supra* pp. 12–13. But an individual's successful resistance to those pressures to speak says nothing about his actual guilt or innocence—and yet the Texas court's rule would allow prosecutors to bolster or even manufacture a case against an individual by using such silence as substantive evidence against him.

In the end, allowing the prosecution to comment on silence during an investigation or use it as substantive evidence of guilt would provide the government with a powerful tool for unfairly conscripting a targeted individual into helping it build a case against him. That tool would be prone to government abuse or overreaching in white-collar criminal investigations, in which it could be especially effective for manufacturing evidence and

cover-up liability in an otherwise weak or non-existent case against innocent targets.

CONCLUSION

For the above reasons, *amicus curiae* American Board of Criminal Lawyers agrees with Petitioner Salinas that this Court should reverse the judgment below.

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Petitioner,

v.

TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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People v. DeGeorge, 541 N.E.2d 11 (N.Y. 1989) 18

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Slochower v. Bd. of Higher Educ. of New York, 350 U.S. 551 (1956) 1

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OTHER AUTHORITIES

8 J. Wigmore, Evidence § 2272 (McNaughton rev. 1961) 19

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Belden, Russonello & Stewart, The Open Soc'y Inst. & Nat'l Legal Aid & Defender Assoc., *Developing a National Message for Indigent Defense: Analysis of National Survey* (2001) 15

Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109 (1998).....12

Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 Mich. L. Rev. 597 (2012) 19

Jane Elinor Notz, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. Chi. L. Rev. 1009 (1997).....16

Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. Louisville L. Rev. 21 (2008).....16, 17

Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 Lewis & Clark L. Rev. 237 (2006) 19

Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, *in The Miranda Debate: Law, Justice, and Policing* (Richard A. Leo & George C. Thomas III eds., 1998).....17

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Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 Mich. L. Rev. 1000 (2001) 11

Richard Rogers et al., *"Everyone Knows Their* Miranda *Rights": Implicit Assumptions and Countervailing Evidence*, 16 Psychol. Pub. Pol'y & L. 300 (2010) 15

Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 Soc. Probs. 305 (2004) 18

Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 Soc. Forces 1009 (2005) 17

Scot Wortley, John Hagan & Ross Macmillan, *Just Des(s)erts? The Racial Polarization of Perceptions of Criminal Injustice*, 31 Law & Soc'y Rev. 637 (1997) 18

Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 Or. L. Rev. 199 (2001) 16, 17

Welsh S. White, Miranda's *Failure to Restrain Pernicious Interrogation Practices*, 99 Mich. L. Rev. 1211 (2001) 11

INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. It is committed to protecting the effectiveness of the Fifth Amendment's privilege against self-incrimination and has participated for decades as an *amicus* in this Court's decisions shaping that privilege, including *Slochower v. Bd. of Higher Educ. of New York*, 350 U.S. 551 (1956); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Spevack v. Klein*, 385 U.S. 511 (1967); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Wainwright v. Greenfield*, 474 U.S. 284 (1986); *Dickerson v. United States*, 530 U.S. 428 (2000); *Chavez v. Martinez*, 538 U.S. 760 (2003); and *Missouri v. Seibert*, 542 U.S. 600 (2004).

STATEMENT OF THE CASE

1. Petitioner Genovevo Salinas was twice tried for first-degree murder. The first trial ended in a hung jury; the second trial resulted in a conviction. During the retrial, prosecutors relied heavily on

[1] The parties have submitted blanket letters of consent to the filing of *amicus* briefs in this case. No counsel for a party has written this brief in whole or in part, and no one other than *amicus*, its members, or its counsel has made a monetary contribution for the preparation or submission of this brief.

Petitioner's pre-arrest, pre-*Miranda* silence in response to police questioning as substantive evidence of his guilt. *Salinas v. State*, 369 S.W.3d 176, 176-77 (Tex. Crim. App. 2012) (*Salinas II*). The issue before the Court is whether a criminal defendant's pre-arrest, pre-*Miranda* silence in response to police questioning may be used against him as substantive evidence of guilt – uniquely among all silence protected by the Fifth Amendment's privilege against self-incrimination.

2. In December 1992, Houston police discovered two homicide victims in their apartment. A witness informed officers that he heard shots fired early that morning and saw a man run from the apartment to a "dark-colored Camaro or Trans Am." *Salinas v. State*, 368 S.W.3d 550, 552 (Tex. App. 2011) (*Salinas I*). Officers also found shotgun shell casings in the apartment.

Petitioner became a subject of investigation when police learned that he had attended a party at the victim's home the night before the murder. *Salinas II*, 369 S.W.3d at 177. After voluntarily accompanying the police to the stationhouse and answering their questions for nearly an hour, he remained silent when asked whether the shotgun shells found at the scene would match a shotgun owned by Petitioner's father. A ballistics report later matched the discarded shells with the shotgun. Petitioner was not charged with the crime, however, until another witness came forward and told police that Petitioner had confessed to the murder. (The witness explained that his

decision to come forward was prompted by a dream in which he saw the victims' ghosts.)

3. The prosecution's closing argument at Petitioner's first trial urged the jury to convict Petitioner based on the ballistics report, the witness's statement regarding Petitioner's alleged confession, and Petitioner's effort to elude arrest. The prosecution referred to Petitioner's silence only in passing. The jury could not reach a verdict, and the judge declared a mistrial.

On retrial, Petitioner's silence became a much more prominent feature of the prosecution's case. It was discussed during testimony, over Petitioner's objection, and then highlighted by the prosecution during its closing argument as strong evidence of guilt. According to the prosecutor, an innocent person would surely have denied any connection between the shotgun found in his home and the shell casings found at the murder scene. In the prosecutor's words:

> The police officer testified that he wouldn't answer that question. He didn't want to answer that. Probably the first time he realizes you can do that. What? You can compare those? You know, if you asked somebody – there is a murder in New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [sic] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say: What are you talking about? I

> didn't do that. I wasn't there. He didn't respond that way. He didn't say: No, it's not going to match up. It's my shotgun. It's been in our house. What are you talking about? He wouldn't answer that question.

Salinas I, 368 S.W.3d at 557 (alteration in original). The jury found Petitioner guilty of murder.

4. The Texas Court of Appeals and the Texas Court of Criminal Appeals both affirmed. Noting a "conspicuous" circuit split among federal appellate courts and a "lack of guidance from the Supreme Court," the Texas Court of Criminal Appeals held that "pre-arrest, pre-*Miranda* silence is not protected by the Fifth Amendment right against compelled self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies." *Id.* at 178-79. One judge dissented.

SUMMARY OF ARGUMENT

In every previous circumstance in which the Court has found the Fifth Amendment privilege against self-incrimination to exist, it has also held that prosecutors cannot use the defendant's rightful silence as substantive evidence of guilt. This protection was applied first to silence at trial, then to silence in response to custodial interrogation, and most recently to silence at sentencing after a guilty plea. Now the Court is presented with the question of whether rightful silence in response to pre-arrest, pre-*Miranda* questioning should also be protected.

As Petitioner has demonstrated in his opening brief, the doctrinal principle that explains those earlier cases necessarily extends to this context as well. We submit this brief to emphasize that withholding protection from pre-arrest, pre-*Miranda* silence would undermine existing Fifth Amendment safeguards, impair the truth-seeking function of criminal proceedings, and negatively affect individual liberty.

First, leaving pre-*Miranda*, pre-arrest silence unprotected would create a perverse incentive for the police to delay the delivery of *Miranda* warnings in order to manufacture substantive evidence of guilt. In 1974, then-Justice Rehnquist wrote for the Court that "an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Michigan v. Tucker*, 417 U.S. 433, 440-41 (1974). That is a compelling reason to protect the privilege against self-incrimination here. If pre-*Miranda* silence becomes more valuable to prosecutors than post-*Miranda* silence, police will delay arrest to avoid *Miranda*, thus undermining *Miranda* and the privilege against self-incrimination.

Second, withholding protection here would allow introduction of prejudicial police testimony about silence into the criminal trial – even though scholarship shows that widespread knowledge of *Miranda*, distrust of police, unfamiliarity with the language, and many other factors make pre-arrest, pre-*Miranda* silence particularly *un*probative of guilt.

Finally, leaving this silence uniquely unprotected would reduce individual liberty by confusing defendants about the consequences of exercising their constitutional rights.

ARGUMENT

I. IN EACH CIRCUMSTANCE WHERE THE COURT HAS FOUND THE PRIVILEGE AGAINST SELF-INCRIMINATION TO EXIST, IT HAS PROTECTED IT BY FORBIDDING PROSECUTORS FROM USING THE DEFENDANT'S RIGHTFUL SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

Ingrained in this Court's Fifth Amendment jurisprudence is the basic principle that, when the privilege against self-incrimination exists, the rightful silence that results from exercising the privilege cannot be used by the prosecution as substantive evidence of guilt. *See Griffin v. California*, 380 U.S. 609 (1965); *Miranda v. Arizona*, 384 U.S. 436 (1966).[2]

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This guarantee includes "the right of a person to remain

[2] The situation is different when a defendant chooses to testify and the prosecution thereafter uses the defendant's prior silence to impeach him. Petitioner addresses the distinction in his brief, and *amicus* need not repeat the argument here. Br. of Pet. 33-37.

silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty" for such silence. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The privilege against self-incrimination afforded by the Fifth Amendment "registers an important advance in the development of our liberty – one of the great landmarks in man's struggle to make himself civilized." *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (quotation omitted). It provides "assurance that a person will not be compelled to testify against himself in a criminal proceeding and a continuing right against government conduct intended to bring about self-incrimination." *Chavez v. Martinez*, 538 U.S. 760, 791 (2003) (Kennedy, J., concurring and dissenting).

In *Griffin v. California*, the Court recognized that the right to remain silent necessarily carries with it the right not to have the prosecution use the defendant's rightful silence as substantive evidence of guilt. 380 U.S. at 615.[3] Without the corollary protection against prosecutorial use, a defendant would be put directly back into the "cruel trilemma of self-accusation, perjury or contempt" that the privilege was meant to eliminate. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). Absent the *Griffin* rule, the defendant could be effectively compelled to testify against himself regardless

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[3] This principle had already been embraced by nearly every state at the time *Griffin* was decided. *See Mitchell v. United States*, 526 U.S. 314, 330 (1999).

of the existence of the privilege because – one way or the other, through testimony or silence – he would be compelled to present evidence against himself. The practice of drawing adverse inferences would thus "cut[ ] down on the privilege by making its assertion costly." *Griffin*, 380 U.S. at 614.

Griffin protected silence at trial, but its logic was quickly applied to protect silence in response to custodial questioning as well. In the Court's landmark decision in *Miranda v. Arizona*, the Court required the government to use "procedural safeguards effective to secure the privilege against self-incrimination" in the context of custodial interrogation. 384 U.S. at 444. As a necessary corollary, the Court also made clear that, because the defendant's silence was protected by the Fifth Amendment, prosecutors "may not, therefore, use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation." *Id.* at 468 n.37. This holding was based not on "an innovation in [this Court's] jurisprudence," but rather on "an application of principles long recognized and applied in other settings." *Id.* at 442. The Court explained:

> To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel,

> simple expedient of compelling it from his own mouth.

Id. at 460 (citations omitted).

Time after time, the Court has reaffirmed *Griffin*'s fundamental rule that rightful silence protected by the Fifth Amendment cannot be used as substantive evidence of guilt. In *Carter v. Kentucky*, the Court reiterated that *Griffin* "stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify," and held that a trial court must instruct the jury not to draw an adverse inference from silence when the defendant so requests. 450 U.S. 288, 301 (1981). Reasoning that an instruction informing a jury of a defendant's Fifth Amendment rights is perhaps the most important instruction of all, *id.* at 302, the Court concluded that "failure to limit the jurors' speculation on the meaning of [a defendant's] silence . . . exacts an impermissible toll on the full and free exercise" of a defendant's exercise of her privilege against self-incrimination, *id.* at 305.

Most recently, the Court applied the rule of *Griffin* to protect a defendant from the adverse use of rightful silence in a sentencing hearing after a guilty plea. *See Mitchell v. United States*, 526 U.S. 314, 316-17 (1999). The Court rejected the government's argument that a guilty plea waived the privilege against self-incrimination for purposes of the sentencing phase of the proceeding, *id.* at 321, then easily concluded that, because the privilege remained, the sentencing court could not draw an adverse inference

from the defendant's silence to determine facts impacting the sentence, *id.* at 328-30. "[T]here can be little doubt," the Court wrote, "that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition." *Id.* at 330. "The Government retains the burden of proving facts relevant to the crime at the sentencing phase and *cannot enlist the defendant in this process at the expense of the self-incrimination privilege.*" *Id.* (emphasis added).

In no circumstance in which the Court has held the Fifth Amendment privilege to exist has it allowed prosecutors to use a defendant's rightful silence as substantive evidence of guilt.

II. THE COURT SHOULD NOT UNIQUELY WITHHOLD PROTECTION FROM RIGHTFUL SILENCE IN RESPONSE TO PRE-ARREST, PRE-*MIRANDA* QUESTIONING.

The Court should not uniquely withhold protection from a defendant's rightful silence in response to pre-arrest, pre-*Miranda* questioning by the police. Not only would such a holding be inconsistent with the Court's doctrine, *see* Br. of Pet. 12-23, but withholding protection would undermine existing Fifth Amendment protections, injure the truth-seeking purpose of criminal trials, and negatively impact individual liberty.

A. Withholding protection will undermine existing protections by encouraging police to manipulate the delivery of *Miranda* warnings and pressuring defendants to testify at trial.

The immediate, first consequence of withholding protection from a defendant's silence in response to pre-arrest, pre-*Miranda* questioning will be to make that silence artificially more valuable to prosecutors than later, protected silence – and thus induce police to develop tactics to manipulate the delivery of *Miranda* warnings to create unprotected silence. This perverse incentive will severely undermine the critical protections that currently exist for criminal defendants.

"The fundamental purpose of the Court's decision in *Miranda* was 'to assure that the *individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.'" *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)). As legal commentators have noted, however, "*Miranda*'s safeguards provide very limited restraints on police interrogators." Welsh S. White, Miranda's *Failure to Restrain Pernicious Interrogation Practices*, 99 Mich. L. Rev. 1211, 1212 (2001). Indeed, police have learned to "work *Miranda* to their advantage – i.e., to issue *Miranda* (or avoid having to issue) warnings in strategic ways that will result in legally accepted waivers." Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 Mich. L. Rev. 1000, 1016 (2001) (quotation marks omitted).

The Court has already had to act once to prevent law enforcement officers from manipulating their interrogation tactics to evade *Miranda*. After the Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings," *Oregon v. Elstad*, 470 U.S. 298, 318 (1985), some police departments taught investigators to employ a question-first method where they did not advise a suspect of his *Miranda* rights until he had already confessed, at which point the investigator would recite *Miranda* warnings and ask the suspect if he would waive his rights. The Court responded by prohibiting the tactic in *Missouri v. Seibert*, 542 U.S. 600, 616 (2004), with a plurality concluding that it was "by any objective measure . . . a policy strategy adapted to undermine *Miranda* warnings." This was not an isolated incident, either. *See generally* Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109 (1998) (describing how police officers in some jurisdictions are "systematically trained to violate *Miranda*").

If the Court were to adopt a rule in this case withholding protection from pre-arrest, pre-*Miranda* silence, it would invite the very type of manipulation that the Court prohibited in *Seibert*. For if the government were permitted to introduce pre-*Miranda* silence as substantive evidence of guilt, law-enforcement officers would have every reason to begin questioning before arrest and before the delivery of *Miranda* warnings precisely to obtain silence to be

used at trial. If the suspect later was given warnings and confessed, so much the better – but every case would start with a threshold showing of guilt through silence.

The threat to *Miranda* posed by withholding protection from pre-arrest, pre-*Miranda* silence is itself a sufficient reason to apply the *Griffin* rule here. *See, e.g.*, *State v. Easter*, 922 P.2d 1285, 1290-91 (Wash. 1996) (citing the concern for manipulation of *Miranda* timing by police if pre-arrest, pre-*Miranda* silence is not protected from use as substantive evidence); *State v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004) (same).

Furthermore, allowing police to comment at trial on pre-arrest, pre-*Miranda* silence will increase pressure on the defendant to testify at trial to explain his prior silence. "Because in the case of substantive use a defendant cannot avoid the introduction of his past silence by refusing to testify, the defendant is under substantial pressure to waive the privilege against self-incrimination either upon first contact with police or later at trial in order to explain the prior silence." *Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000). His necessary decision then – to waive the privilege against self-incrimination at a later stage to explain exercise of the privilege earlier – would undermine the right against self-incrimination.

B. Allowing the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt will impede the truth-seeking function of criminal trials.

What is worse, a suspect's silence in response to police questioning before the delivery of *Miranda* warnings has little or no probative value, yet the prejudicial inference prosecutors would urge juries to draw has been demonstrated to influence verdicts beyond all proportion to its relevance. Withholding protection from pre-arrest, pre-*Miranda* silence would not advance the truth-seeking function of criminal trials – it would impede it.

1. Pre-arrest, pre-*Miranda* silence has very little or no probative value for indicating guilt.

This Court long ago recognized that evidence of a suspect's silence during custodial police questioning holds little probative value. *See United States v. Hale*, 422 U.S. 171, 176-77 (1975). The many reasons why an innocent defendant may remain silent – a pre-existing knowledge of *Miranda* rights, unfamiliarity with the language, fear of police manipulation – apply with equal force to pre-arrest, pre-*Miranda* questioning.

The first reason that silence is consistent with innocence is that, "[a]t this point in our history, virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: 'No

person . . . shall be compelled in any criminal case to be a witness against himself . . . .'" *Michigan v. Tucker*, 417 U.S. 433, 439 (1974). The Court made that comment in 1974. In 1980, Justice Marshall noted that "we cannot assume that in the absence of official warnings individuals are ignorant of or oblivious to their constitutional rights." *Jenkins v. Anderson*, 447 U.S. 231, 247 (1980) (Marshall, J., dissenting). In 1998, Justice Scalia found it "implausible" that any individual under investigation would be unaware of his right to remain silent "[i]n the modern age of frequently dramatized '*Miranda*' warnings." *Brogan v. United States*, 522 U.S. 398, 405 (1998). In 2000, Chief Justice Rehnquist stated that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). And in 2001, researchers found that 81% of people surveyed recognized that criminal suspects have the right to remain silent. Richard Rogers et al., *"Everyone Knows Their* Miranda *Rights": Implicit Assumptions and Countervailing Evidence*, 16 Psychol. Pub. Pol'y & L. 300, 302 (2010) (citing Belden, Russonello & Stewart, The Open Soc'y Inst. & Nat'l Legal Aid & Defender Assoc., *Developing a National Message for Indigent Defense: Analysis of National Survey* 4 (2001)). Now, in 2013, pre-arrest, pre-*Miranda* silence is just as likely to be attributed to pre-existing knowledge of *Miranda*'s rights as to any other reason – precluding any probative value of the silence to prove guilt.

Pre-existing knowledge of *Miranda* is only the first in a long list of reasons why an innocent defendant may remain silent in the face of police questioning. In *Hale*, this Court identified the following, additional reasons: not hearing or understanding a question; a "fear or unwillingness to incriminate another"; or simple intimidation. 422 U.S. at 177. *Hale* involved post-arrest silence, but each of the reasons it listed – as well as those cited by other courts – applies equally to pre-arrest questioning. *See, e.g.*, *Ex parte Marek*, 556 So. 2d 375, 381 (Ala. 1989) (anger or fright); *People v. Conyers*, 420 N.E.2d 933, 935 (N.Y. 1981) ("a mistrust for law enforcement authority"); *O'Hearn v. State*, 113 N.W. 130, 134 (Neb. 1907) ("fear that the worst possible interpretation would be placed upon" a statement). Pre-arrest silence is no more probative of guilt than the post-arrest silence this Court discarded in *Hale*.

Scholarly research since *Hale* only supports this Court's skepticism regarding the connection between silence and guilt. *See generally* Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. Louisville L. Rev. 21 (2008); Jane Elinor Notz, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. Chi. L. Rev. 1009 (1997). Borrowing from extensive research across multiple disciplines, one scholar has highlighted twenty potential meanings conveyed by silence. *See* Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 Or. L. Rev. 199, 203 (2001). By

remaining silent, an individual may be asserting power, strategically maintaining interpersonal distance, demonstrating intense anger or resentment, or simply reflecting an inability to understand or communicate effectively. Krieger, *supra*, at 225-31; Thompson, *supra*, at 47-49. This research confirms a proposition embraced by *Hale*: that silence of *any kind*, and at any stage, may mean any number of things other than an admission of guilt.

Often, a suspect's silence may suggest nothing more than distrust of law enforcement – a message that may be reinforced by counsel. "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting). And for good reason. "[P]olice questioning now consists of subtle and sophisticated psychological ploys, tricks, stratagems, techniques, and methods that rely on manipulation, persuasion, and deception for their efficacy." Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America, in The Miranda Debate: Law, Justice, and Policing* 65 (Richard A. Leo & George C. Thomas III eds., 1998), *quoted in* Thompson, *supra*, at 45.

Others, particularly minorities, may avoid talking to police investigators because they perceive that the American criminal justice system is biased against them. *See generally* Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 Soc. Forces 1009, 1017 (2005).

Studies have consistently confirmed this phenomenon, noting that minorities tend to be "more negative and suspicious of the police" than whites. Scot Wortley, John Hagan & Ross Macmillan, *Just Des(s)erts? The Racial Polarization of Perceptions of Criminal Injustice*, 31 Law & Soc'y Rev. 637, 647 (1997); *see also* Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 Soc. Probs. 305, 316 (2004) (finding that "blacks are three to five times more likely to believe that [police] misconduct frequently occurs in their city" than whites). Such perceptions may lead innocent minorities to remain silent in the face of police scrutiny. *See, e.g.*, *People v. DeGeorge*, 541 N.E.2d 11, 13 (N.Y. 1989); *Conyers*, 420 N.E.2d at 935. Allowing pre-arrest, pre-*Miranda* rightful silence to be used as substantive evidence of guilt thus could disproportionately affect vulnerable populations.

For the foregoing reasons, a suspect's silence in response to police questioning is "insolubly ambiguous," *Doyle v. Ohio*, 426 U.S. 610, 617 (1976), whether it arises under the custodial interrogation in *Hale* and *Doyle* or the pre-*Miranda* questioning at issue here.

2. Inferences from a defendant's silence can prejudicially influence a jury out of all proportion to their probative value.

As an empirical matter, silence in response to pre-arrest, pre-*Miranda* police questioning may mean nothing – but that is not how juries react to it.

As this Court has previously concluded, "[t]he danger is that [a] jury is likely to assign much more weight to [a] defendant's previous silence than is warranted." *Hale*, 422 U.S. at 180; *see also Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978) (noting that inferences from silence "may be inevitable"). Indeed, "[t]he layman's natural first suggestion would probably be that the resort to privilege . . . is a clear confession of crime." 8 J. Wigmore, Evidence § 2272 at 426 (McNaughton rev. 1961), *quoted in Lakeside*, 435 U.S. at 340 n.10. Accordingly, the Court has recognized that "the rule against adverse inferences from a defendant's silence in criminal proceedings . . . is of proven utility." *Mitchell v. United States*, 526 U.S. 314, 329 (1999).

Empirical evidence suggests that the Court's concern is warranted. In one survey examining perceptions of a defendant's silence at trial, roughly one in five jurors found it relevant that the defendant did not testify, and one in six admitted that "the defendant not testifying made it more likely that he/she would be found guilty." Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 Lewis & Clark L. Rev. 237, 264-65 (2006). Other surveys have reached similar conclusions. *See* Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 Mich. L. Rev. 597, 622-24 (2012).

Defendants face the same kind of "intolerably prejudicial impact," *Hale*, 422 U.S. at 180, when the

government introduces their pre-arrest silence in response to police questioning as substantive evidence of guilt. This case demonstrates the point. The jury in Petitioner's first trial, hearing little evidence of his silence in response to police questioning, failed to reach a verdict. Respondent garnered a conviction in Petitioner's second trial only after heavily emphasizing Petitioner's rightful silence in response to police questioning – silence that as an empirical matter proves nothing.

3. Failing to protect pre-arrest, pre-*Miranda* silence would raise deep concerns under the Due Process Clause.

One more consequence flows from the near-universal knowledge of *Miranda*'s rights – a fundamental unfairness rising to the level of a due process violation if a defendant's rightful silence may be used against him as substantive evidence of guilt at trial. In *Doyle v. Ohio*, the Court recognized that, "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." 426 U.S. at 618. The Court therefore held that "it would be fundamentally unfair and a deprivation of due process" to allow the prosecution to impeach the defendant's trial testimony by pointing to his prior silence in response to police questioning. *Id.* Now that *Miranda*'s "warnings have become part of our national culture," *Dickerson*, 530 U.S. at 443, it

would be wholly artificial to make the *delivery* of those warnings the line between silence that can and cannot be used as substantive evidence of guilt at trial. If defendants have the right to remain silent, and if they know that they have the right, it is fundamentally unfair to allow their silence to be used as testimony against them.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a person who is suspected of a crime but not under arrest voluntarily chooses to speak to the police, is the use at trial of his silence in response to a single question a violation of his Fifth Amendment right not to "be compelled in any criminal case to be a witness against himself . . . ."

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IN THE

Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, petitioner seeks to create yet another federal constitutional rule excluding valid, probative

1. Both parties have filed blanket consents for *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

evidence that would have been admissible under the Constitution as originally understood, based on an extrapolation from the Fifth Amendment privilege. This interference with the truth-finding function of criminal trials is contrary to the interests of victims that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On December 18, 1992, brothers Juan and Hector Garza were shot with a shotgun in Hector's Houston, Texas, apartment. Juan died at the scene, and Hector was later pronounced dead at the hospital. See *Salinas* v. *State*, 368 S. W. 3d 550, 552 (Tex. App. 2011). The crime scene investigator recovered six shotgun shells from the scene. See *ibid*.

Police went to the home of Genovevo Salinas's parents, where he also lived. "Salinas's father tendered a shotgun to the police. Salinas agreed to voluntarily accompany the officers to a police station for questioning." *Ibid*. Salinas voluntarily answered every question but one. See J. A. 19 (interviewing officer's testimony). When asked if the shotgun his father handed over would match the shells found at the scene, he did not answer verbally. J. A. 17. He "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." J. A. 18. Salinas did not terminate the interview but continued answering other questions. J. A. 18.

"Salinas's first trial resulted in a mistrial, but the jury in his second trial found him guilty and sentenced him to twenty years' imprisonment and a $5,000 fine." *Salinas*, 368 S. W. 3d, at 554. "Salinas appeal[ed] his conviction contending that: (1) his attorney rendered ineffective assistance at trial by failing to object to improper opinion testimony regarding Salinas's truth-

fulness, and (2) the trial court improperly admitted evidence of Salinas's silence during a pre-arrest interview. [The intermediate appellate court] affirm[ed]." *Id.*, at 551.

The Texas Court of Criminal Appeals, the state court of last resort for criminal cases, "granted the appellant's petition for discretionary review on one ground: whether the Court of Appeals erred in holding that the Fifth Amendment right against compelled self-incrimination does not apply to pre-arrest, pre-*Miranda* silence used as substantive evidence of guilt in cases in which a defendant does not testify." *Salinas* v. *State*, 369 S. W. 3d 176, 177 (2012) (footnote omitted). The court answered that question in the negative while noting the extensive split of authority nationwide and inviting guidance from this Court. See *id.*, at 178-179. This Court granted certiorari.

SUMMARY OF ARGUMENT

This case is about suppression of evidence. Suppression is so fundamentally unfair that it violates due process of law in many circumstances when the suppression runs against the defendant. The people are also entitled to due process of law, and rules suppressing evidence should be made only when clearly required by the Constitution or when supported by powerful justification.

Miranda notwithstanding, there is no "right to remain silent" in the Constitution. The Fifth Amendment guarantees a right not to be compelled to be a witness against oneself in a criminal case, which is not the same thing. A defendant's choice to be a witness is binary, yes or no. There is no right to pick and choose, being a witness on some questions and not others. Cases where a person is compelled to testify in a pro-

ceeding other than a criminal case against himself, and must assert the privilege only against incriminating questions, are distinguishable. Assuming that making an unsworn statement to investigating officers is being a witness, Salinas voluntarily chose to be a witness. His lack of a verbal answer to a single question and accompanying body language were admissible at trial and not a violation of his right against compulsion.

Under the circumstances of this case, there is no compelling policy argument against admission of this evidence. Whether a complete refusal to speak to police at all would be forbidden as a constitutional mandate (as opposed to an application of Rule 403) is a question that should be decided in a case that presents it.

ARGUMENT

I. Rules excluding probative evidence operate to defeat justice and should be confined to the limits of original understanding or compelling justification.

When the prosecution seeks to exclude evidence proffered by the defendant, this Court has long recognized that fundamental fairness places constitutional limits on exclusion.

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. [Citations.] This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. [Citations.]" *Holmes* v. *South Carolina*, 547

U. S. 319, 324 (2006) (internal quotation marks omitted).

Similarly, when the prosecution suppresses evidence by failure to disclose exculpatory evidence in its possession, this misconduct calls forth denunciations of the injustice, using the word "suppression" as a grave charge, as indeed it is. See, *e.g.*, *Cone* v. *Bell*, 556 U. S. 449, 451 (2009). Yet every day in courtrooms throughout America, defense lawyers make motions to suppress evidence, and this is accepted as routine. Suppression is suppression, and it defeats justice in both directions.

Criminal procedure is not, of course, completely symmetrical, and the fact that a practice would not be allowed against the defendant does not necessarily mean it is impermissible when employed against the prosecution. However, if a practice is thought to be so fundamentally unfair as to constitute a violation of the constitutional guarantee of due process of law, then great caution is in order before declaring that a practice constitutionally forbidden in one direction is constitutionally required in the other. "The people of the State are also entitled to due process of law." *Stein* v. *New York*, 346 U. S. 156, 197 (1953), overruled on other grounds, *Jackson* v. *Denno*, 378 U. S. 368, 391 (1964). Just as the defendant's right to due process of law is violated when evidence is suppressed by nondisclosure or arbitrary rules of evidence, so the people's right to due process of law is violated when rules of exclusion are created out of whole cloth or extended beyond their necessary scope.

When a clear rule is written into the text of the Constitution, there is no place for judicial balancing of interests. For example, courts cannot substitute other methods of assuring reliability of evidence where the Constitution requires confrontation. See *Crawford* v. *Washington*, 541 U. S. 36, 61-62 (2004). The present

case does not involve such a clear rule. The question presented in this case is considerably removed from the core meaning of the pertinent clause of the Fifth Amendment, as discussed in Part II, *infra*, and an extension of that clause to exclude this evidence requires compelling justification.

Undeniably, an accurate verdict is not the only interest at stake in a criminal trial. The trial must be conducted with due observance of the defendant's rights. The definition of how far those rights should extend beyond the clear meaning and original understanding of the provision in question, however, must be determined with due consideration of competing interests.

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those in which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.).

The accuracy of the verdict is a paramount interest, and, to that end, modern rules of evidence declare all relevant evidence to be admissible unless excluded by a particular rule. See, *e.g.*, Fed. Rule Evid. 402. A rule excluding evidence that has probative value and would permit the trier of fact to make a more accurate determination of guilt or innocence generally requires an assessment of the weighty interest of accuracy against the purpose that the exclusionary rule is thought to serve, as well as an assessment of how well it actually serves the interest.

Exclusion of evidence in state trials on federal constitutional grounds was once rare, reserved for

extreme circumstances. See, *e.g.*, *Brown* v. *Mississippi*, 297 U. S. 278, 279 (1936) (confession beaten out of defendant). In the 1960s, with *Mapp* v. *Ohio*, 367 U. S. 643, 656-657 (1961), *Massiah* v. *United States*, 377 U. S. 201, 206 (1964), *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and their multitudinous progeny, motions to suppress evidence on federal constitutional grounds having little or nothing to do with the reliability of the evidence became a routine feature of criminal practice.

This Court soon recognized that the costs of these extrapolations from constitutional rights exceeded the benefits in many circumstances and made exceptions to the rules of exclusion in cases where the cost/benefit imbalance was most apparent. See, *e.g.*, *Wong Sun* v. *United States*, 371 U. S. 471, 491 (1963) (attenuated connection); *Brown* v. *Illinois*, 422 U. S. 590, 608-609 (1975) (Powell, J., concurring in part) (cost/benefit basis of *Wong Sun*); *Harris* v. *New York*, 401 U. S. 222, 226 (1971) (*Miranda* noncompliant statements for impeachment); *New York* v. *Quarles*, 467 U. S. 649, 657-658 (1984) (public safety exception to *Miranda*, "outweighs the need for a prophylactic rule"); *United States* v. *Leon*, 468 U. S. 897, 922 (1984) (good-faith reliance on issuing magistrate, cost outweighs benefit).

The cost in these cost/benefit analyses is the heavy cost of a miscarriage of justice. Judge Cardozo's classic example of an unjust suppression of evidence was the suppression of the body of a murder victim, allowing the murderer to go free. See *People* v. *Defore*, 242 N. Y. 13, 23-24, 150 N. E. 585, 588 (1926). In an age when common sense counted for more than it does today, the grotesque injustice of such a horrible result was sufficient to refute the argument for a universal exclusionary rule. That nightmare nearly came true in a *Massiah* case, *Brewer* v. *Williams*, 430 U. S. 387, 416-417, and n. 1 (1977) (Burger, C. J., dissenting), and the retrial was

saved only by application of the inevitable discovery doctrine to some fortuitous facts. See *Nix* v. *Williams*, 467 U. S. 431, 449-450 (1984).

The injustices resulting from excluding evidence take a toll in terms of public confidence in the judiciary as well. Public confidence is important for every branch of government, but particularly for the one with "neither Force nor Will but merely judgment . . . ." The Federalist No. 78, p. 523 (J. Cooke ed. 1961) (A. Hamilton). The *Miranda* decision was extremely controversial, and it was soon repudiated by Congress. See 18 U. S. C. § 3501. This Court eventually struck down this statute and upheld *Miranda*, *Dickerson* v. *United States*, 530 U. S. 428, 443-444 (2000), because *Miranda* was by then too deeply ingrained to overrule, not because it was correctly decided in the first place. Congress's repudiation of *Miranda* remains as an admonition against excessively expansive rules excluding evidence, even if it is too late to enforce according to its terms. *Mapp* v. *Ohio*, 367 U. S., at 651-652, pointed to California and its adoption of a state search-and-seizure exclusionary rule, but the people of California have since adopted by direct vote a sweeping repudiation of such rules, recognizing in the State Constitution the right of victims of crime to truth in evidence. See Cal. Const., Art. I, § 28(f)(2); see also *California* v. *Greenwood*, 486 U. S. 35, 44-45 (1988).

The people know injustice when they see it. Rules excluding evidence, "if applied indiscriminately, may well have the opposite effect of generating disrespect for the law and the administration of justice." *Stone* v. *Powell*, 428 U. S. 465, 491 (1976).

As a general principle, then, any argument for extending a constitutional rule excluding evidence beyond the core meaning of the provision in question must carry a heavy burden. Absent a compelling

justification, relevant evidence should be admissible, and facts should not be concealed from the finder of fact.

II. Consideration of the selective silence of one who voluntarily chooses to speak does not violate the right not to "be compelled . . . to be a witness . . . ."

In *Miranda* v. *Arizona*, 384 U. S. 436, 444 (1966), this Court directed police officers to warn an arrested person before questioning that "he has a right to remain silent . . . ." No such right appears in the text of the Fifth Amendment. The actual constitutional right is not to "be compelled in any criminal case to be a witness against himself . . . ." U. S. Const., Amdt. 5. That is a different right. See Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 Mich. L. Rev. 2625, 2625-2631 (1996). Although Fifth Amendment jurisprudence is replete with discussions of "waiver," see, *e.g.*, *Miranda*, *supra*, at 444, that usage is incorrect. If a person chooses to be a witness, his right not to be compelled remains intact, having been neither violated nor waived. See Alschuler, *supra*, at 2627.

In recent cases involving the Confrontation Clause of the Sixth Amendment, this Court has focused on what it means to be a "witness." See *Crawford* v. *Washington*, 541 U. S. 36, 51 (2004); *Davis* v. *Washington*, 547 U. S. 813, 821 (2006). There is much discussion of old English abuses and early American practice in order to ascertain what the clause means and how to apply it to contemporary procedure. See *Crawford*, *supra*, at 43-50 (the Marian statutes, infamous English trials, and early American authorities); *Davis*, *supra*, at 831, n. 5 (police questioning as equivalent of Marian

magistrate examination). Renewed attention to the text and original understanding is similarly in order with regard to the Fifth Amendment.

Petitioner contends, citing *Crawford* and *Davis*, that use of noncustodial police questioning of a suspect makes him a "witness against himself." See Brief for Petitioner 30. The historical record is contrary. Committing magistrates regularly took statements from arrestees, and these statements were admissible at trial, with the magistrate himself as the witness, provided the statement was unsworn. See Langbein, Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 Mich. L. Rev. 1047, 1060-1062 (1994). While the English pretrial procedure was the subject of some controversy in the early American republic, no one thought it violated the Fifth Amendment. See Alschuler, 94 Mich. L. Rev., at 2659-2660.

The question of whether "witness" has the same meaning for the Fifth Amendment that it has under *Crawford* need not be resolved in the present case, however. Even assuming that Salinas's prearrest interview with the police amounted to being a witness, he was not *compelled* to be a witness.

The choice of whether to be a witness is a binary one, yes or no. At trial, the defendant has the right to not be a witness under the Fifth Amendment or the right to be one under the Due Process and Compulsory Process Clauses. See *Rock* v. *Arkansas*, 483 U. S. 44, 51-52 (1987). He does not have the right to pick and choose which questions he will answer. While there is language in this Court's opinions justifying this rule at trial on the need of the adversary system to prevent the defendant from testifying to a half-truth, see *Brown* v. *United States*, 356 U. S. 148, 156 (1958), other cases state this as an aspect of the privilege itself. "The immunity from giving testimony is one which the

defendant may waive by offering himself as a witness." *Raffel* v. *United States*, 271 U. S. 494, 496 (1926). "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Id.*, at 497. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do." *Id.*, at 499.

The binary nature of the privilege is a better basis for this rule than a policy-based assessment of the needs of the adversary system. If the question were one of policy, an argument could be made for scrapping the privilege altogether and adopting measures more tailored to the underlying rationales. See 8 J. Wigmore, Evidence § 2251, pp. 295-318 (J. McNaughton rev. ed. 1961). But the question is not merely one of policy. If the Fifth Amendment privilege really did grant a right to selectively "be a witness" or not on a question-by-question basis, no considerations of policy could abrogate that right without a constitutional amendment. See *supra*, at 5. It is far more sound as a matter of constitutional jurisprudence to base the rule on *Raffel*'s understanding of the nature of the privilege—a yes or no choice to be a witness or not.

Petitioner attempts to brush off the selective silence problem in a footnote. See Brief for Petitioner 36, n. 5. The authorities he cites are easily distinguishable. In *Hoffman* v. *United States*, 341 U. S. 479, 481 (1951), the underlying proceeding was a wide-ranging grand jury investigation. In *Quinn* v. *United States*, 349 U. S. 155, 157-158 (1955), it was a congressional hearing. Neither was "a criminal case," the proceeding to which the constitutional privilege applies. In both, the witness had been summoned and had no privilege to refuse to testify altogether. There is a long history of allowing

witnesses in civil cases and witnesses other than the defendant in criminal cases to invoke the privilege only as to questions that incriminate them. "Once a witness was sworn, he was subject to compulsion, and his only protection lay in the ability to decline to answer specific questions. The protection of common law defendants, by contrast, lay in not being sworn at all." Alschuler, 94 Mich. L. Rev., at 2659.

Petitioner's third authority for selective silence, *Edwards* v. *Arizona*, 451 U. S. 477 (1981), does not directly involve the real Fifth Amendment privilege at all. *Edwards* is a "second layer of prophylaxis," *McNeil* v. *Wisconsin*, 501 U. S. 171, 176-177 (1991), empowering a suspect in custody to require the police to terminate the interrogation and not approach him for a waiver again until counsel has been provided. See also *Maryland* v. *Shatzer*, 559 U. S. 98, 130 S. Ct. 1213, 1220, 175 L. Ed. 2d 1045, 1053 (2010). Whatever the merits of *Edwards*, it has no application to a person who has not been in custody at any relevant time in the case. See *id.*, 130 S. Ct., at 1223, 175 L. Ed. 2d, at 1057 (prophylactic rule terminates 14 days after release from custody).

If we assume that making an unsworn statement to the police constitutes being a witness for the purpose of the Fifth Amendment, then Salinas chose to be a witness when he chose to speak to the police about the murder of Juan and Hector Garza. His choice to be a witness was not compelled. In these circumstances, the use at trial of his answers, nonanswers, and body language is not a violation of his right not to be compelled to be a witness, the right *actually* protected by the Fifth Amendment.

III. There is no justification for extending existing prohibitions on use of silence to the circumstances of this case.

As discussed in Part II, *supra*, the evidence in this case does not come within the prohibition of the Fifth Amendment, as properly understood. As discussed in Part I, *supra*, any proposal to extend constitutional rules excluding evidence beyond their core requires powerful justification. Neither petitioner nor supporting *amici* offer any significant justification, much less a powerful one, for extending an exclusionary rule to the circumstances of this case. The justification they offer is for other cases and may be considered when such a case arises.

Petitioner protests that allowing use of a suspect's prearrest silence "would leave the person no way to avoid creating evidence against himself." Brief for Petitioner 10. That is an argument against a rule that allows a suspect's simple refusal to speak to the police at all—refusal to "be a witness"—to be used against him. *Amici* supporting the petitioner make similar arguments. See Brief for American Board of Criminal Lawyers as *Amicus Curiae* 12-13; Brief for National Association of Criminal Defense Lawyers and Texas Criminal Defense Lawyers Association as *Amici Curiae* 3-4.

The case these arguments envision is not the case presently before the Court. Salinas did not refuse to speak to the police. He did not decline to "be a witness." He voluntarily participated in the interview, see J. A. 14, and he verbally answered every question but one. See J. A. 19. The option that petitioner insists must be preserved, refusing to speak to the police at all, was available to him, but he did not exercise it.

Petitioner insists that there are circumstances where silence has limited probative value, and there is a danger of prejudice from jurors giving silence more weight than it deserves. Brief for Petitioner 22-23. These problems exist for many kinds of evidence, and they are highly dependent on the circumstances of the individual case. That is why we have one of the most basic rules of evidence to enable the trial judge to deal with the problem case by case. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. Rule Evid. 403; see also *Old Chief* v. *United States*, 519 U. S. 172, 182-185 (1997) (importance of context). Most states have similar rules. See, *e.g.*, Tex. Rule Evid. 403; see also R. Park, et al., Evidence Law 12 (3d ed. 2011) (42 states pattern evidence rules on federal model); *Jenkins* v. *Anderson*, 447 U. S. 231, 239, and n. 5 (1980) (probative value as matter of evidence law).

The present case is a counter example. The various reasons other than guilt why a person might refuse to speak to the police at all are not applicable here, because Salinas did not refuse to speak to the police. In the circumstances of this case, Salinas's lack of a verbal answer to a single question and his body language have substantial probative value for guilt and no good alternative explanation.

The case has not been made for a sweeping rule prohibiting all use of prearrest silence against a nontestifying defendant in a criminal case. An argument might be made for a more limited rule against use of particular refusals to speak, such as a refusal to speak to the police at all or a termination of an interview by a person who did not know he was suspected

and terminated upon learning that he was. If such a rule is to be made on a constitutional basis, it should be made only in a case that actually presents the question. See *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). The case presently before the Court does not.

CONCLUSION

The decision of the Texas Court of Criminal Appeals should be affirmed.

March, 2013

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 12-246

In the
Supreme Court of the United States

GENOVEVO SALINAS,
PETITIONER,
v.
TEXAS,
RESPONDENT.

On Writ of Certiorari to the
Texas Court of Criminal Appeals

BRIEF OF *AMICI CURIAE* STATES OF ILLINOIS, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAI'I, IDAHO, INDIANA, KANSAS, KENTUCKY, MAINE, MICHIGAN, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WISCONSIN, AND WYOMING IN SUPPORT OF RESPONDENT

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Charles M. Gray, *Self-Incrimination in Interjurisdictional Law*, in The Privilege Against Self-Incrimination (R.H. Helmholz, *et al.*, eds. 1997). 11

R.H. Helmholz, *The Privilege & the* Ius Commune, in The Privilege Against Self-Incrimination (R.H. Helmholz, *et al.*, eds. 1997). 10

Michael J. Hunter, *The Man On The Stairs Who Wasn't There: What Does A Defendant's Pre-Arrest Silence Have To Do With* Miranda, *The Fifth Amendment Or Due Process?*, 28 Hamline L. Rev. 277 (2005). 24

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Leonard W. Levy, Origins of the Fifth Amendment (1968). 10, 12, 13

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INTEREST OF THE *AMICI CURIAE*

As the States' chief law enforcement officers, the *amici* have a substantial interest in ensuring that the trier of fact in criminal proceedings hears all relevant, probative evidence, provided that evidence satisfies state-law rules prohibiting the admission of unduly prejudicial material. Silence under circumstances when "'it would have been natural * * * to object to [an] assertion'" may constitute such relevant, probative evidence, *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (quoting *United States v. Hale*, 422 U.S. 171, 176 (1975)), as it did here, where petitioner declined to answer only one of the many questions police asked him during an hour-long, voluntary interview. State and federal courts have decades of experience applying their rules of evidence to admit such evidence of silence when it will help the trier of fact achieve a just outcome—and to exclude it when the potential for prejudice outweighs the evidence's probative value. By supplanting these case-by-case determinations with a sweeping, constitutional rule barring the admission of silence as evidence of guilt across the board, petitioner would deprive courts of valuable evidence and undermine the reliability of the criminal process. Because this result has no basis in the text or history of the Fifth Amendment, in policy, or in this Court's precedent, the *amici* States urge this Court to affirm the decision below.

STATEMENT

Petitioner knew that police were investigating a double homicide, and he voluntarily accompanied them to the station house for questioning. Pet. App. 2a, 9a. Petitioner was not in custody, and he was free to leave.

Pet. App. 10a. "For approximately one hour," petitioner "answered every question asked"—save one. Pet. App. 2a. When asked whether shotgun casings recovered from the murder scene would match a weapon retrieved from his home, petitioner did not answer. Pet. App. 2a, 10a-11a. Instead, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, [and] began to tighten up." Pet. App. 11a (internal quotations omitted). The interview then continued, with petitioner answering all remaining questions. Pet. App. 11a-12a. A ballistics analysis later matched the shells recovered from the murder scene with petitioner's shotgun. Pet. App. 2a. Petitioner was subsequently charged with murder, but he evaded arrest (and trial) for fifteen years, until he was found living under a false identity. Pet. App. 2a, 13a.

At trial, an officer testified about petitioner's silence when asked about the shotgun casings, and the prosecutor commented in closing argument that "[a]n innocent person" would have answered the question. Pet. App. 18a. On appeal, the Texas Court of Criminal Appeals found no Fifth Amendment error in the state trial court's admission of petitioner's "pre-arrest, pre-*Miranda* silence" as evidence of guilt. Pet. App. 6a. The court pointed to the "plain language of the Fifth Amendment," which "protects a defendant from *compelled* self-incrimination," and explained that "[i]n pre-arrest, pre-*Miranda* circumstances, a suspect's interaction with police officers is not compelled." *Ibid.* (emphasis in original). "Thus, the Fifth Amendment right against compulsory self-incrimination is 'simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.'" *Ibid.*

(quoting *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)).

SUMMARY OF ARGUMENT

Petitioner's view that the Fifth Amendment prohibits substantive use of pre-arrest, pre-*Miranda* silence in all cases is impossible to reconcile with the text and history of the Amendment, and it undermines sound policy favoring the admission of relevant evidence that will tend to improve the accuracy of a criminal verdict.

First, petitioner's proposed rule is inconsistent with the text of the Fifth Amendment, which prohibits only *compelled* self-incrimination. It does not bar government action whose practical effect is to induce a defendant to speak. The criminal process (like its civil counterpart) "is replete with situations requiring 'the making of difficult judgments,'" *McGautha v. California*, 402 U.S. 183, 213 (1971), and the government need not make the exercise of the Fifth Amendment privilege cost free. Nor is the substantive use of pre-arrest silence somehow at odds with our accusatorial system of justice, for this Court long ago declined to limit the State to evidence it "procure[s] * * * against an accused 'by its own independent labors.'" *Schmerber v. California*, 384 U.S. 757, 762 (1966).

Second, petitioner's argument is impossible to square with the history of the Fifth Amendment. Under English common law and in America at the time of the Framing, the privilege against self-incrimination barred statements obtained by forced oath or torture, nothing more. The accused were required to submit to pretrial

examinations, at which their unsworn statements (including any failure to respond to questions put to them) were recorded for use as evidence of guilt at trial. Although some later-enacted American laws prohibited prosecutors from commenting on a defendant's failure to testify at trial, those laws did not address the use of pre-arrest silence, and, in any event, they were enacted *after* the Fourteenth Amendment extended the Fifth Amendment to the States.

Third, rules of evidence already require courts, before admitting evidence of a defendant's pre-arrest silence, to find that the silence is probative, not disproportionately prejudicial, and arose in circumstances that called for a reply. These rules accommodate petitioner's concerns that substantive use of pre-arrest silence will lead to wrongful convictions, without banning its use in cases where, as here, it may properly assist the trier of fact.

Fourth, and finally, substantive use of pre-arrest silence would not encourage police misconduct, as petitioner contends. Even if police wished to try to "create" silence by delaying the initiation of custody and the issuance of *Miranda* warnings (which is unlikely), these incentives already exist, for pre-arrest silence is admissible for impeachment purposes.

In the end, petitioner's argument is a plea for this Court to extend *Griffin v. California*, 380 U.S. 609 (1965), and to apply *dicta* from a footnote in *Miranda v. Arizona*, 384 U.S. 436 (1966), to his case. But the *Griffin* rule that prosecutors may not comment on a defendant's failure to testify at trial is supported by historical and practical justifications that do not exist for petitioner's proposed rule. And by its terms

Miranda was limited to custodial police interrogations, as this Court's later decisions confirm.

ARGUMENT

I. Petitioner's Argument Is Inconsistent With The Text Of The Fifth Amendment.

The Fifth Amendment forbids compelled self-incrimination. See *McKune v. Lile*, 536 U.S. 24, 36 (2002) (plurality op.) ("the Court has insisted that the 'constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony'") (quoting *United States v. Washington*, 431 U.S. 181, 188 (1977)) (emphasis in original). Petitioner's proposed rule fails because the mere possibility that a defendant's pre-arrest, pre-*Miranda* silence might serve as evidence of guilt at trial does not "compel" the defendant to incriminate himself.

A. The Government May Create Incentives For Defendants To Speak Without Engaging In Unconstitutional "Compulsion."

The Fifth Amendment exists to protect defendants from the "cruel trilemma" of having to choose among "self-accusation, perjury [and] contempt." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). But an individual does not risk contempt or other punishment by declining to respond to pre-arrest police questioning. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) ("It is difficult to see how a voluntary interview could 'compel' respondent to speak."). To be sure, the possibility that a defendant's pre-arrest silence would come into evidence might induce him to answer questions prior to arrest, or to

take the stand at trial (to explain away the earlier refusal to speak), but this is not prohibited *compulsion*. See *Baxter*, 425 U.S. at 318 (no unconstitutional compulsion when "silence was given no more evidentiary value than was warranted by the facts surrounding [the] case"); *McGautha*, 402 U.S. at 213 (rejecting argument that "the mere force of evidence is compulsion of the sort forbidden by the privilege"). It merely raises the possibility that the defendant would be disadvantaged as a result of the decision to stay silent, consistent with the "well settled" principle "that the government need not make the exercise of the Fifth Amendment privilege cost free." *McKune*, 536 U.S. at 41 (plurality op.).

This Court has reaffirmed this principle repeatedly. Pre-arrest silence is admissible for impeachment purposes—even though defendants might decide to speak for fear that their silence would come into evidence if they testify at trial—because "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Jenkins*, 447 U.S. at 236. Likewise, the trier of fact may draw an adverse inference from an inmate's refusal to answer questions at a voluntary clemency interview. See *Woodard*, 523 U.S. at 286-288. Again, although the inmate may feel "pressure to speak in the hope of improving his chance at being granted clemency," "this does not make the interview compelled." *Id.* at 288. And capital defendants may be convicted and sentenced to death after a single trial, notwithstanding the pressure to testify at the guilt phase to avoid foregoing their right to introduce mitigation testimony at the punishment phase. See *McGautha*, 402 U.S. at 213-217;

see also *McKune*, 536 U.S. at 35-36, 41-42 (plurality op.) (prison officials may deny privileges to convicted sex offenders who refuse to admit their crimes); *Baxter*, 425 U.S. at 316-320 (adverse inferences may be drawn from inmate's silence at prison disciplinary hearing). Again, "[t]he criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments.'" *McGautha*, 402 U.S. at 213.

In the same fashion, the Court has sustained the practice of plea bargaining, which by its nature forces defendants to choose between admitting guilt and staying silent, where silence brings the likelihood of more serious charges. See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (rejecting due process challenge where plea negotiations "presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution"); *Brady v. United States*, 397 U.S. 742, 750-751 (1970) (rejecting Fifth Amendment challenge to plea bargain, even though defendant was "influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained"). Here, again, "the Court determined that the[] hard choice between silence and the consequences was not compelled." *McKune*, 536 U.S. at 44-45 (plurality op.).

In short, petitioner is wrong to argue that substantive use of pre-arrest silence is unconstitutional compulsion because it "penalizes [a defendant's] decision to remain silent." Pet. Br. 12. In fact, this Court has repeatedly approved putting criminal defendants to "hard choice[s]" when it comes to deciding between speech and silence. *McKune*, 536 U.S. at 44-45 (plurality op.).

B. The Fifth Amendment Does Not Bar The State From Requiring Defendants To Produce Incriminating Evidence.

Nor does the Fifth Amendment prohibit the State from requiring a suspect to "produce evidence against himself," as petitioner contends. Pet. Br. 19; see also Pet. Br. 17 (arguing that petitioner was required to "create[] evidence" against himself); Amer. Bd. of Crim. Lawyers Br. 23 (claiming that criminal defendant is entitled "to make the government find any incriminating evidence without his help"). In fact, this Court long ago rejected the theory that the Fifth Amendment "require[s]" the State to "procure the evidence against an accused 'by its own independent labors,'" *Schmerber*, 384 U.S. at 762; *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) (same), and our criminal justice system routinely requires criminal defendants to produce such evidence.

This Court thus rejected a Fifth Amendment challenge to a state-law requirement that defendants provide the prosecution with pretrial notice of any alibi defense, notwithstanding that such notice would result in defendants involuntarily "furnish[ing] the State with information useful in convicting [them]." *Williams v. Florida*, 399 U.S. 78, 82 (1970). Likewise, the Court upheld requirements that defendants produce prior statements by third-party trial witnesses, although the statements included "'information that may incriminate [the defendants],'" *United States v. Nobles*, 422 U.S. 225, 233-234 (1975), and similarly upheld the admission of all manner of defendant-generated, non-testimonial evidence "that might be used to prosecute [defendants] for a criminal offense," *Schmerber*, 384 U.S. at 761; see *Pennsylvania v. Muniz*, 496 U.S. 582, 590-592 (1990)

(consistent with Fifth Amendment, defendant may be compelled to produce blood, handwriting, and voice samples, and to participate in line-up).

Accordingly, petitioner's argument that substantive use of pre-arrest silence is necessary to "preserve[] our accusatorial system of justice," *e.g.*, Pet. Br. 14, is misplaced. Neither that system, nor the Fifth Amendment, limits the prosecution to evidence it "procure[s] * * * 'by its own independent labors.'" *Schmerber*, 384 U.S. at 762. Rather, the question for Fifth Amendment purposes is whether self-incriminating testimony was compelled. And, as explained, putting a suspect to "hard choice[s]," *McKune*, 536 U.S. at 44-45 (plurality op.), between speaking and remaining silent is not unconstitutional compulsion.

II. Petitioner's Argument Is Inconsistent With The History Of The Fifth Amendment.

Practice in the run-up to the Fifth Amendment's ratification (and in the decades thereafter) confirms the error in petitioner's construction. See generally *Jenkins*, 447 U.S. at 239 (holding that Fifth Amendment does not bar impeachment use of pre-arrest silence because, *inter alia*, "[c]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted") (citing 3A J. Wigmore, Evidence § 1042, p. 1056 (Chadbourn rev. 1970)). Under English common law and in America at the time of the Framing, the privilege against self-incrimination protected defendants from "(1) incriminating interrogation under oath, (2) torture, and (3) probably other forms of coercive interrogation such

as threats of future punishment and promises of leniency." Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in The Privilege Against Self-Incrimination 181, 192 (R.H. Helmholz, *et al.*, eds. 1997) (footnotes omitted).[1] Where unsworn, self-incriminating statements (including pretrial statements) were concerned, however, English and American courts "strongly encourag[ed] them and * * * drew[] adverse inferences when defendants failed to provide them." *Id.* at 202; see also *Mitchell v. United States*, 526 U.S. 314, 332-333 (1999) (Scalia, J., dissenting) (common law "ban[ned] only testimony forced by compulsory oath or physical torture").

A. In England, Defendants Were Required to Submit To Preliminary Examinations, And The Failure To Answer Questions Was Admissible As Evidence Of Guilt.

The Fifth Amendment privilege originated in the *ius commune* (the law applied on the European continent and in English ecclesiastical courts until the seventeenth century) as the maxim "'*nemo tenetur prodere seipsum.*'" R.H. Helmholz, *The Privilege & the* Ius Commune, in The Privilege Against Self-Incrimination 17, 17-19 & n.1 (R.H. Helmholz, *et al.*, eds. 1997). Translated as "'No person is to be

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[1] For history, petitioner relies entirely on Leonard W. Levy, Origins of the Fifth Amendment (1968). He makes no mention of *The Privilege Against Self-Incrimination*, which this Court described as "the present culmination of * * * scholarship" concerning "the previous manifestations of the privilege against self-incrimination." *United States v. Balsys*, 524 U.S. 666, 674 n.5 (1998).

compelled to accuse himself,'" this principle barred the State from requiring one to be the *source* of his or her own prosecution. *Id.* at 17. In contrast, persons legitimately suspected of having committed a crime were expected to submit to questioning. See *id.* at 23-24 (describing "*fama publica*" exception to privilege). Thus, the common law privilege did not prohibit all required self-incrimination; rather, it protected one from interrogation without well-grounded suspicion, akin to today's probable cause requirement. See *id.* at 23.

In the late sixteenth and early seventeenth century, the English common law courts invoked *nemo tenetur* in writs of prohibition and habeas corpus to prevent ecclesiastical courts from requiring suspects to answer incriminating questions under oath. See *id.* at 18-19; Charles M. Gray, *Self-Incrimination in Interjurisdictional Law*, in The Privilege Against Self-Incrimination 47, 48-51 (R.H. Helmholz, *et al.*, eds. 1997). Specifically, these writs aimed to shield suspects from the *ex officio* oath procedure, whereby an ecclesiastical court would require the accused to swear to answer any questions the court might put to it, subjecting the suspect to prison for contempt if he refused to answer. See John H. Langbein, *The Privilege & Common Law Criminal Procedure*, in The Privilege Against Self-Incrimination 82, 101 (R.H. Helmholz, *et al.*, eds. 1997). *That* is the procedure that put suspects to the "cruel trilemma"—the choice among "self-accusation, perjury or contempt"—that the Fifth Amendment proscribes. *Murphy*, 378 U.S. at 55.

In this way, the common law writs precluded only compelled *sworn* testimony; *nemo tenetur* did not prevent the State from compelling self-incriminating

statements that were not under oath. To the contrary, although the common law courts did not permit criminal defendants to testify under oath, the courts did expect defendants to speak, *unsworn*, on their own behalf at a pretrial examination, and the courts would use a defendant's refusal to speak as evidence of guilt at trial. See Langbein, *supra*, at 92. The Marian Committal Statute of 1555 thus created "a system of pretrial inquiry that was devoted to pressuring the accused to incriminate himself." Langbein, *supra*, at 91 & n.53. Pursuant to that statute, a magistrate would question every suspect immediately after apprehension (not under oath), transcribe anything the suspect said that was relevant to proving the charged crime, and transmit this information to the court for use by the prosecution at trial. See *ibid.* (describing 2 & 3 Philip & Mary, ch. 10, § 2 (1555)). "[T]he accused was 'expected to answer'" the magistrate's inquiries, and "any refusal to answer * * * was reported and stated by the magistrate in his testimony at the trial." Langbein, *supra*, at 92 (footnote omitted). This system remained in place in England until 1848. See Henry E. Smith, *The Modern Privilege*, in The Privilege Against Self-Incrimination 144, 147 (R.H. Helmholz, *et al.*, eds. 1997) (describing passage of Jervis's Act of 1848, which "required for the first time that the accused be cautioned about his right to silence in the pretrial investigation").

Leonard Levy, on whose history petitioner relies, agrees that there was no privilege against self-incrimination during "the preliminary examination of the suspect" conducted under the Marian Committal Statute. Levy, Origins of the Fifth Amendment 325 (1968). Levy acknowledges that "inquisitorial tactics

were routine" "[i]n the initial pre-trial stages of a case," and "[a]ny admissions" obtained during the magistrate's pretrial examinations "could be introduced against [the suspect] as evidence at his trial." *Ibid.*; see also Langbein, *supra*, at 92 (discussing Levy). Petitioner's reliance on Levy is therefore misplaced: although Levy identifies a common law right to "refus[e] to answer without formal prejudice or penalty," Levy, *supra*, at 313 (quoted at Pet. Br. 15, 19), he concludes specifically that this right did not extend to pretrial interrogations.

B. American Courts Adopted The English Practice Of Requiring Defendants To Provide Pretrial Statements For Use At Trial.

Criminal procedure in colonial America followed the English pattern. Defendants were examined unsworn at pretrial committal hearings by a justice of the peace, who was required to take down all evidence against the defendant—necessarily including evidence of the defendant's refusal to answer—for admission at trial. See Eben Moglen, *The Privilege in British North America*, in The Privilege Against Self-Incrimination 109, 112 (R.H. Helmholz, *et al.*, eds. 1997); see also *Portuondo v. Agard*, 529 U.S. 61, 66 (2000) ("[d]efendants routinely were asked (and agreed) to provide a pretrial statement to a justice of the peace"). And while some early state constitutions included a self-incrimination clause, these provisions merely codified the existing practice of banning incriminating statements obtained by forced oath or torture. Moglen, *supra*, at 136. In short, "[w]hat we know of the circumstances surrounding the adoption of the Fifth Amendment * * * gives no indication that the Framers

had any sense of a privilege more comprehensive than common law practice then revealed"—a right to protection from testimony forced by torture or oath but nothing more. *United States v. Balsys*, 524 U.S. 666, 673 n.5 (1998).

In America, in fact, "[t]he pretrial statement did not begin to fall into disuse until the 1830's," *Portuondo*, 529 U.S. at 66 (citing Alschuler, *supra*, at 198)—about when England abandoned preliminary examinations and well after ratification of the Fifth Amendment in 1791. Meanwhile, in the decades following the Fifth Amendment's passage, justices of the peace had continued to question suspects at pretrial examinations, and the suspects' silence had continued to be admitted as evidence of guilt at trial. See Moglen, *supra*, at 139-140. While at times lawyers objected to these examinations on *non-constitutional* grounds (arguing that the Marian statute did not apply in America), there was no suggestion that the practice violated the Fifth Amendment. See Alschuler, *supra*, at 197; see also *Mitchell*, 526 U.S. at 334 (Scalia, J., dissenting) ("there is no indication whatever that criminal procedure in America made an abrupt about-face when [the *nemo tenetur*] principle was ratified as a fundamental right in the Fifth Amendment and its state-constitution analogues").

Rather, questions about the admissibility of pretrial silence were traditionally resolved under the rules of evidence—not the Constitution. Wigmore thus describes "a working rule" of evidence—which was pervasive "in practice (and especially in the original English tradition)"—under which "whatever was said in a party's presence was receivable against him as an admission, because presumably assented to" as long as

"no other explanation [was] equally consistent with silence." 4 J. Wigmore, Evidence § 1070, p. 102 (Chadbourn rev. 1972). Likewise, today, the Federal Rules of Evidence (and analogous state rules) permit prosecutors to introduce evidence of a defendant's silence if the defendant "would, under the circumstances, protest the statement made in his presence if untrue," and even then only if the silence's prejudicial effect does not exceed its probative value, see Fed. R. Evid. 403; Fed. R. Evid. 801(d)(2)(B) advisory committee's note; see also *infra* pp. 17-18 (describing adoptive admissions rules).

Petitioner notes that some late-nineteenth century courts "forbade the prosecution from arguing that a defendant's failure to testify indicated guilt," Pet. Br. 13, but this would not have prohibited use of pre-arrest silence and, in any event, much of this occurred long *after* the ratification of the Fifth Amendment. Indeed, under the common law, criminal defendants were not even allowed to give sworn testimony at trial. See *McGautha*, 403 U.S. at 214; *Ferguson v. Georgia*, 365 U.S. 570, 574 (1961). Maine (in 1864) was the first State to enact a statute abolishing this rule, see *Ferguson*, 365 U.S. at 577, but the Maine statute was interpreted by that State's supreme court to allow juries to consider a defendant's failure to testify as evidence of guilt, see Alschuler, *supra*, at 198-199 & n.99 (discussing *State v. Bartlett*, 55 Me. 200 (1867)). And in 1868 (when the Fourteenth Amendment was ratified, extending the Fifth Amendment to the States) only eight States had statutes permitting defendants to testify (California, Connecticut, Massachusetts, Minnesota, Nevada, Ohio, South Carolina, and Vermont). See *Ferguson*, 365 U.S. at 577 & n.6.

* * *

The history of the privilege against self-incrimination thus provides no support for petitioner's argument that "our forebears" "reject[ed] an inquisitorial system of justice," Pet. Br. 14, or, more specifically, that they rejected the use of pre-trial silence as evidence of guilt. The historical record instead demonstrates that the Framers objected to testimony forced by oath or torture, but beyond that, the State could encourage defendants to give self-incriminating pre-trial statements, subject to an adverse inference at trial if they failed to do so.

III. Admitting Pre-Arrest Silence As Evidence Of Guilt Promotes The Truth-Seeking Function Of Criminal Trials.

As this "Court has consistently recognized," "in proper circumstances silence in the face of accusation is a relevant fact," and may be "'evidence of the most persuasive character,'" *Baxter*, 425 U.S. at 319 (quoting *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-154 (1923)); see also *Jenkins*, 447 U.S. at 238 (admitting pre-arrest silence for impeachment "advances the truth-finding function of the criminal trial"). Petitioner's rule would withhold this evidence from the trier of fact in all cases, even under the "proper circumstances" this Court contemplated in *Baxter*, and would therefore "derogate[] rather than improve[] the chances for accurate decisions." *Baxter*, 425 U.S. at 319. Petitioner claims that his *per se* rule is nonetheless essential to "protect[] the innocent from unjust conviction" and discourage government from "subvert[ing] the Fifth Amendment," Pet. Br. 21-23, 31-33, but these policy arguments fall short.

A. Petitioner's Rule Is Unnecessary To Protect Against Wrongful Convictions.

A holding that the Constitution permits the substantive use of pre-arrest silence does not mean that evidentiary rules will always, or even often, allow such use. See *Jenkins*, 447 U.S. at 240 ("Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial."); *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) ("A State is entitled * * * to leave to the judge and jury under its own rules of evidence" the decision whether to allow impeachment use of pre-*Miranda* silence). The presence of these state and federal rules undercuts petitioner's call for a competing, *per se*, constitutional rule. See generally *Perry v. New Hampshire*, 132 S. Ct. 716, 729 (2012) (rejecting claim that due process requires exclusion of allegedly unreliable eyewitness testimony because, *inter alia*, "[s]tate and federal rules of evidence * * * permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact").

The Texas rules of evidence at work in petitioner's trial, and their federal counterparts, illustrate the point. If, under the circumstances, a defendant's pre-arrest silence is ambiguous, then the silence must be excluded as irrelevant. See Tex. R. Evid. 402 ("Evidence which is not relevant is inadmissible."); Fed. R. Evid. 402. Even if relevant, moreover, the silence will be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tex. R. Evid. 403; Fed. R. Evid. 403. And silence also must satisfy the prerequisites of the "adoptive admission rule," which creates a hearsay

exception for third-party statements that are "offered against a party" only where that "party has manifested an adoption or belief in [the statement's] truth." Tex. R. Evid. 801(e)(2); Fed. R. Evid. 801(d)(2)(B). Under this rule, silence qualifies as an admission only if the third-party "statement or remark is made in defendant's presence, which he understood and which called for a reply." *Crestfield v. State*, 471 S.W.2d 50, 53 (Tex. Crim. App. 1971); see also Fed. R. Evid. 801(d)(2)(B) advisory committee's note (silence is admissible only if defendant "would, under the circumstances, protest the statement made in his presence if untrue").

Other States' laws are to the same effect. If silence is sufficiently probative—and insufficiently prejudicial—state courts will admit it. See, *e.g.*, *State v. Leecan*, 504 A.2d 480, 484-485 (Conn. 1986) (defendant's pre-arrest silence in "circumstances naturally calling for him to speak" is admissible as evidence of guilt because "'no other explanation is consistent with silence'"); *State v. Helgeson*, 303 N.W.2d 342, 347-348 (N.D. 1981) (pre-arrest silence "was not ambivalent" under facts of case and thus was admissible in prosecution's case-in-chief); *People v. Schollaert*, 486 N.W.2d 312, 317 (Mich. Ct. App. 1992) (pre-arrest silence was admissible pursuant to state rules of evidence, because silence was probative of guilt and not precluded by tacit admission rule).

But where pre-arrest silence carries little probative weight, or is disproportionately prejudicial, state courts bar its substantive use at trial. See, *e.g.*, *Adams v. State*, 261 P.3d 758, 770 (Alaska 2011) (defendant's pre-arrest silence was inadmissible because that "'silence may well have reflected nothing more than his awareness of and

reliance on [his rights]'") (brackets in original); *People v. Welsh*, 80 P.3d 296, 306 (Colo. 2003) (defendant's pre-arrest silence was improperly admitted as evidence of guilt because "[u]nder the facts of this case," the silence "was not relevant under CRE 401 and was unfairly prejudicial under CRE 403"); *State v. Pigg*, 743 P.2d 770, 771 (Or. Ct. App. 1987) (defendant's pre-arrest silence should not have been admitted, being of "little probative value," because "[t]here were many possible reasons for defendant's [silence], including, as defendant testified was the case, that he had been acting on the advice of counsel"). As petitioner acknowledges, a handful of States—Alabama, Georgia, Maryland, and New York—actually preclude substantive use of pre-arrest silence entirely,[2] see Pet. Br. 23, further illustrating the role that non-constitutional rules of evidence do and should play in realizing the very policies petitioner espouses.

Petitioner's argument that a constitutional ban on pre-arrest silence is necessary to prevent "unjust conviction[s]," Pet. Br. 21, thus assumes not only that juries will fail to give pre-arrest silence its proper evidentiary weight (even when urged by defense counsel to discount it, as defense counsel is free to do), but also that courts will ignore applicable rules of evidence

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[2] Petitioner incorrectly describes pre-arrest silence as being "flatly inadmissible as a matter of state evidence law" in Colorado. Pet. Br. 23. *People v. Welsh*, 80 P.3d 296 (Colo. 2003) (cited at Pet. Br. 23), shows that Colorado courts apply a case-specific analysis when deciding whether to admit pre-arrest silence as evidence of guilt. See *id.* at 306 (pre-arrest silence should not have been admitted "*[u]nder the facts of this case*").

designed to police the very concerns about irrelevant or disproportionately prejudicial evidence that petitioner identifies. "Federal constitutional law cannot rest on speculative assumptions so dubious as these." *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978).

Finally, the Court's statement in *Doyle v. Ohio*, 426 U.S. 610 (1976), that post-*Miranda* silence is "insolubly ambiguous," *id.* at 617, was a prudential concern and not a constitutional holding, as the Court's post-*Doyle* decisions demonstrate. See *Wainwright v. Greenfield*, 474 U.S. 284, 294 (1986) ("the ambiguity of the defendants' silence in *Doyle* merely added weight to the Court's principal rationale, which rested on the implied assurance contained in the *Miranda* warning"); *Fletcher*, 455 U.S. at 607 (impeachment use of pre-*Miranda* silence does not violate due process because defendant did not receive "affirmative assurances embodied in *Miranda* warnings"). If pre-arrest silence lacks evidentiary value, it is the rules of evidence—but not the Constitution—that require its exclusion.

B. Petitioner's Rule Is Unnecessary To Prevent Police Misconduct.

Nor would a decision allowing the substantive use of pre-arrest silence open the door to the State "exploit[ing]" or "subvert[ing]" the Fifth Amendment, as petitioner contends. Pet. Br. 31-32.

As an initial matter, if government were to "make it a crime to refuse to respond to officers' questions during noncustodial investigatory interviews," or to attach "significant noncriminal penalties" to such refusals (as petitioner hypothesizes, *id.* at 30), that would raise a materially different constitutional

question than the one presented here. When assessing whether a government practice violates the Fifth Amendment, "[i]t is proper to consider the nexus between remaining silent and the consequences that follow." *McKune*, 536 U.S. at 44 (plurality op.). Thus, in *McKune*, the plurality and the dissent agreed that the Fifth Amendment does not permit a penalty to follow automatically from the decision to remain silent (as the penalty does in petitioner's hypothetical), at least if the penalty is sufficiently severe. See *ibid.* (plurality op.) ("the automatic nature of the consequence may be a necessary condition to finding unconstitutional compulsion"); *id.* at 61 (Stevens, J., dissenting) ("there is an appreciable difference between an official sanction for disobeying a direct order and a mere risk of adverse consequences stemming from a voluntary choice").

In contrast, the decision to remain silent in response to non-custodial police interrogation merely raises the possibility of a later, adverse inference at trial; no negative consequences (such as a conviction) inevitably follow. See *McKune*, 536 U.S. at 60 (Stevens, J., dissenting) (distinguishing Fifth Amendment violation from self-incrimination claim based on "conjecture and speculation about the indirect consequences that may flow from a decision to remain silent"). That distinguishes this case from petitioner's hypothetical and from true penalty cases like *Gardner v. Broderick*, 392 U.S. 273, 276-279 (1968), cited at Pet. Br. 30, which prohibited the government from forcing a public employee to incriminate himself by threatening him with the automatic loss of his job if he remained silent.

Nor is there anything impermissible in a police officer truthfully informing a suspect that a decision not

to respond to pre-arrest questioning could be used against the suspect at trial (subject to applicable evidentiary rules, see *supra* Part III.A). See Pet Br. 31-32. Again, the criminal justice system is "replete with situations requiring the making of difficult judgments." *McGautha*, 402 U.S. at 213. And it is hard to see how police "exploit" Fifth Amendment jurisprudence, Pet. Br. 31, or injure suspects by truthfully informing them of the consequences of a decision to remain silent. Suspects face "real choice[s]," and the "clear articulation of the options makes a choice better informed and thus more rather than less voluntary." *United States v. Miller*, 450 F.3d 270, 272 (7th Cir. 2006), abrogated on other grounds, *Kimbrough v. United States*, 552 U.S. 85, 93 n.4 (2007). In any event, petitioner's claim that "many people would succumb to this type of tactic," Pet. Br. 32, is questionable. A guilty person is far more likely to remain silent and run the risk of an adverse inference than to volunteer incriminating statements. See *Mitchell*, 526 U.S. at 331 (Scalia, J., dissenting) ("in most instances, a guilty defendant would choose to remain silent *despite* the adverse inference, on the theory that it would do him less damage than his own cross-examined testimony") (emphasis in original).

Petitioner's next argument proceeds from the assumption that police—even though they have probable cause for arrest, even though (in petitioner's view) pre-arrest silence is of "limited probative value," Pet. Br. 23, and even though any pre-arrest silence might be inadmissible under applicable evidentiary rules—will routinely delay placing suspects in custody and issuing *Miranda* warnings to "create" pre-arrest silence, *id.* at 32. But even in the unlikely event that

police would be moved by such incentives, they already exist: under *Jenkins* and *Fletcher*, a suspect's pre-*Miranda* silence is admissible if the suspect testifies at trial. Moreover, this argument proceeds from the mistaken premise that a criminal defendant may never be required to produce inculpatory evidence. But as explained, see *supra* Part I.B, this Court has approved myriad practices requiring a defendant to provide evidence "that might be used to prosecute him for a criminal offense." *Schmerber*, 384 U.S. at 761.

Finally, *amici*'s related argument that police will question suspects in a "hostile or discomfiting manner," Nat'l Ass'n of Crim. Def. Lawyers Br. 20, in an effort to elicit silence rather than truthful answers, is even more implausible. It is hard to imagine that police would purposefully forego the possibility of obtaining incriminating statements to obtain a suspect's silence, which is inherently less valuable and may end up being excluded under evidentiary rules in any event.

IV. A Holding That Pre-arrest Silence Is Admissible As Substantive Evidence Is In Line With This Court's Precedent.

In the end, petitioner's claim reduces to an invitation for this Court to extend "the *Griffin* rule" and *dicta* from a footnote in *Miranda*. Pet. Br. 17-19. But neither *Griffin* nor *Miranda* require a holding that pre-arrest silence is inadmissible as evidence of guilt.

A. *Griffin* Does Not Require Petitioner's Rule.

The statement in *Griffin* that the prosecution may not comment on a defendant's failure to testify at trial because such comment "is a penalty imposed by courts

for exercising a constitutional privilege," 380 U.S. at 614, is in tension with the Court's subsequent admonitions that "the government need not make the exercise of the Fifth Amendment privilege cost free," *McKune*, 536 U.S. at 41 (plurality op.); see also *supra* Part I.A. Nor did *Griffin* "even pretend to be rooted in a historical understanding of the Fifth Amendment." *Mitchell*, 526 U.S. at 335 (Scalia, J., dissenting); see also *id.* at 341 (Thomas, J., dissenting) (*Griffin* "lacks foundation in the Constitution's text, history, or logic").

But this Court need not revisit *Griffin* to reject petitioner's position here, for there are both historical and practical differences between a defendant's decision to remain silent at trial and his decision to do so during pre-arrest questioning. Under the English common law and in Framing-era America, criminal defendants could not testify under oath. See *McGautha*, 402 U.S. at 214; *Ferguson*, 365 U.S. at 574-575; *supra* p. 15. The Framers thus arguably "would have agreed that a defendant's refusal to submit to the compulsion of an oath could not be the subject of adverse comment." Alschuler, *supra*, at 199; see also Michael J. Hunter, *The Man On The Stairs Who Wasn't There: What Does A Defendant's Pre-Arrest Silence Have To Do With* Miranda, *The Fifth Amendment Or Due Process?*, 28 Hamline L. Rev. 277, 282-283 (2005) (noting differences between pre-arrest, pre-*Miranda* silence and failure to testify at trial, and arguing that Constitution permits use of former but not latter as evidence of guilt).

Moreover, silence in the face of pre-arrest questioning may be more suspicious than a failure to testify at trial. An innocent defendant might decline to take the stand for a variety of reasons that would not lead him to decline to withhold a response to

noncustodial police questioning, including fear of opening the door to impeachment with past convictions. See Fed. R. Evid. 609(a)(1) (past convictions are admissible to impeach accused's credibility if probative value outweighs prejudicial effect); see also *Griffin*, 380 U.S. at 613 (describing reasons why innocent defendant might not "'willingly be placed on the witness stand'"). And while defense counsel might easily explain to the jury any non-incriminating reasons for pre-arrest silence, "a defendant's decision whether to testify is typically based on the advice of his counsel," and thus "often could not be explained without revealing privileged communications between attorney and client." *Jenkins*, 447 U.S. at 242-243 (Stevens, J., concurring in the judgment). The Court's holding in *Griffin* thus is readily distinguished from the rule petitioner seeks here.

B. *Miranda* Does Not Require Petitioner's Rule.

Nor, finally, does *dicta* from a footnote in *Miranda* compel the adoption of petitioner's rule, as he contends. See Pet. Br. 13-14, 17, 28. In *Miranda*, this Court held that compulsion may be presumed when an individual is subject to custodial interrogation. See *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (*Miranda* "concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements."); *Thompson v. Keohane*, 516 U.S. 99, 107 (1995) ("'[I]n-custody interrogation[s],' this Court recognized in *Miranda v. Arizona*, place 'inherently compelling pressures on the persons interrogated.'") (quoting *Miranda*, 384 U.S. at 467) (brackets in original); *Muniz*, 496 U.S. at 599 (in *Miranda*, "the inherently coercive environment created

by the custodial interrogation precluded the option of remaining silent"). But this presumption does not apply to noncustodial police questioning, as the Court's decisions declining to extend *Miranda* to noncustodial settings establish. See, *e.g.*, *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*); *Beckwith v. United States*, 425 U.S. 341, 346-347 (1976).

To be sure, there is some pressure to speak whenever police interview a suspect. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011) ("Any police interview of an individual suspected of a crime has 'coercive aspects to it.'") (quoting *Mathiason*, 429 U.S. at 495); *accord California v. Beheler*, 463 U.S. 1121, 1124 (1983) (*per curiam*). But "[o]nly those interrogations that occur while a suspect is in police custody * * * 'heighten[n] the risk' that statements obtained are not the product of the suspect's free choice." *J.D.B.*, 131 S. Ct. at 2401 (quoting *Dickerson*, 530 U.S. at 435); see also *Mathiason*, 429 U.S. at 495 (noncustodial police interrogation does not create "that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited").

Therefore, if a person is not in police custody, he "is under no official compulsion whatever." *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring in the judgment). His decision to speak is not compelled merely because he submits to noncustodial police questioning. See *Beckwith*, 425 U.S. at 347-348 (statements made in noncustodial police interview were voluntary, even though suspect did not receive *Miranda* warnings); *Berkemer v. McCarty*, 468 U.S. 420, 441-442 (1984) (suspect's pre-arrest statements were admissible). This does not mean the Fifth Amendment has no application to noncustodial police questioning, as

petitioner contends. See Pet. Br. 29; see also *Beckwith*, 425 U.S. at 248 ("We recognize, of course, that non-custodial interrogation might possibly * * * 'overbear petitioner's will[.]'"). It means merely that an individual is not subject to unconstitutional compulsion unless something more coercive than ordinary police interrogation occurs.

Petitioner argues that Justice Stevens was referring in *Jenkins* to "the time period before a suspect faces any questioning at all from police, not simply the time period before he is taken into custody," Pet. Br. 34, but this is incorrect. Justice Stevens drew a clear line between "a defendant's decision not to testify at his own trial," on the one hand, and "his silence in a precustody context," on the other. 447 U.S. at 241; see also *id.* at 243 (explaining that reasons for prohibiting comment on defendant's silence at trial "have no application in a pre-arrest context"). Nor is there any constitutional reason to distinguish (as petitioner would) between a defendant who remains silent during pre-arrest questioning and one who, as in *Jenkins*, left the crime scene without "'wait[ing] for the Police to tell them what happened.'" *Jenkins*. 447 U.S. at 233.

* * *

Rather than leave questions of relevance and prejudice for courts to address under their rules of evidence, petitioner seeks a *per se*, constitutional ban on the substantive use of pre-arrest silence that is without basis "in the Constitution's text, history, or logic." *Mitchell*, 526 U.S. at 341 (Thomas, J., dissenting). His proposed rule would "derogate[] rather than improve[] the chances for accurate decisions," *Baxter*, 425 U.S. at 319, and it should be rejected.

CONCLUSION

The judgment of the Texas Court of Criminal Appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

GENOVEVO SALINAS,
Petitioner,

v.

TEXAS,
Respondent.

On a Writ of Certiorari to the Texas Court of Criminal Appeals

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 40,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

The Texas Criminal Defense Lawyer's Association ("TCDLA") is an affiliate member of NACDL and the largest state association for criminal defense lawyers in the country, with more than 3200 members.

NACDL's and TCDLA's (collectively "Amici's") mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The State of Texas obtained Petitioner's conviction at trial based, in significant part, on evidence of his silence in response to police questioning. This result is antithetical to the Fifth Amendment, and Amici agree with Petitioner that the Texas Court of Criminal Appeals' judgment should be reversed. Amici submit this brief to elaborate on the reasons why the Fifth Amendment protects a defendant's refusal to answer law enforcement questioning, whether before or after he has been arrested.

There is no question under this Court's precedent that individuals have a constitutional right to remain silent when questioned by police. *See Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Kastigar v. United States*, 406 U.S. 441, 445 (1972). The Texas court's decision would punish exercise of that right by allowing the government to use the defendant's silence against him. This result, if allowed to stand, would empower the state to "overcome[] the mind and will of the person under investigation and depriv[e] him of the freedom to decide whether to assist the state in securing his conviction." *In re Gault*, 387 U.S. 1, 47 (1967).

In fact, the decision below allows the suspect no real alternative to "assist[ing] the state in securing his conviction." *Id.* His options are to speak—and the state may use his words to incriminate him at trial—or to stay silent—and the state may use that silence against him. In that case, the state need not seek the truth, and may instead rely on the layman's instinct that a refusal to answer "is a clear confession of crime." *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978) (internal quotation marks omitted). That is precisely what the prosecutor did in this case, when he argued to the jury that "[a]n innocent person is going to" answer police questions. Pet. at 6.

Every day, NACDL and TCDLA lawyers advise countless clients—rich or poor, innocent or guilty—not to make statements to law enforcement. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part) ("[A]ny lawyer worth his salt will tell the suspect in no

uncertain terms to make no statement to police under any circumstances."). This simple advice helps to protect a suspect's constitutional rights under the Fifth and Sixth Amendments and puts the burden on the Government to establish any guilt beyond a reasonable doubt at trial.

The decision below would call this advice into question, as a suspect who declines to assist the police may be deemed presumptively guilty at trial. This Court should reverse the Texas Court of Criminal Appeals' decision and clarify that the Fifth Amendment prohibits using the defendant's pre-arrest silence as evidence of his guilt at trial.

ARGUMENT

I. THE FIFTH AMENDMENT APPLIES PRIOR TO ARREST.

The Court has held repeatedly that the Fifth Amendment broadly applies when the government questions an individual, without regard to the timing of the questioning or to the individual's status as a suspect, arrestee, or criminal defendant. "[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States*, 406 U.S. 441, 444 (1972). "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him

in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The Fifth Amendment applies not only to formal proceedings but to "informal," "investigatory" matters. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) (applying the Fifth Amendment to investigatory questioning by the New York Attorney General's office).

The Court has applied the Fifth Amendment in numerous pre-arrest settings. These include grand jury questioning (even when a witness is not a suspect), *United States v. Calandra*, 414 U.S. 338, 346 (1974), questioning in civil cases, *Pillsbury Co. v. Conboy*, 459 U.S. 248, 263–64 (1983), congressional inquiries, *Quinn v. United States*, 349 U.S. 155, 162–63 (1955), government forms, such as tax returns, *see, e.g., Garner v. United States*, 424 U.S. 648, 656 (1976), and administrative investigations and questioning, *see In re Groban*, 352 U.S. 330, 333 (1957) ("This is a privilege available in investigations as well as in prosecutions.").

In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the petitioner refused to provide his name to a police officer investigating a possible assault. *Id.* at 180. Hiibel was arrested for that refusal under a Nevada "stop and identify" statute. *Id.* at 181–82. Even though the questioning occurred prior to any arrest, the Court considered the Fifth Amendment, and upheld the arrest and conviction only because the information sought—Hiibel's identity—was not incriminatory, and thus

not protected by the privilege. *Id.* at 189–91.[2] No member of the Court found the Fifth Amendment inapplicable pre-arrest or suggested that Hiibel could be arrested based on his failure to provide information that, unlike his name, might incriminate him.

Respondent relies heavily on Justice Stevens's concurrence in *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980), to argue that the Fifth Amendment does not apply pre-arrest. *See* Respondent Pet. Br. at 13. The Texas Court of Criminal Appeals also cited the *Jenkins* concurrence for that proposition. *Salinas v. Texas*, 369 S.W.3d 176, 179 & n.10 (Tex. 2012). This misconstrues Justice Stevens's views. His concurrence accepted as "fact that a citizen has a constitutional right to remain silent when he is questioned." *Jenkins*, 447 U.S. at 243 (Stevens, J., concurring). Justice Stevens's observation that the privilege "is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak," *id.* at 241, referred to the facts of *Jenkins*, where the "silence" that was used against the petitioner was his *flight from the police*. Jenkins was not silent in response to any police questioning of any kind.

Justice Stevens's later dissent in *Hiibel* proves the point. There, he opined clearly that a suspect

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[2] The Court left open the possibility that a suspect's identity could be incriminatory in some "unusual circumstances." 542 U.S. at 191.

may refuse to answer questioning and his silence cannot be used against him.

> The protections of the Fifth Amendment are directed squarely toward those who are the focus of the government's investigative and prosecutorial powers. In a criminal trial, the indicted defendant has an unqualified right to refuse to testify and may not be punished for invoking that right. . . . ***There is no reason why the subject of police interrogation based on mere suspicion . . . should have any lesser protection.***

Hiibel, 542 U.S. at 193 (Stevens, J., dissenting) (emphasis added).

II. USING SILENCE AS EVIDENCE OF GUILT COMPELS A SUSPECT TO INCRIMINATE HIMSELF.

Once it is accepted that the Fifth Amendment applies prior to arrest, it follows that the government cannot use a suspect's pre-arrest silence as evidence of his guilt. Any other result would undermine the Fifth Amendment's protections and punish its exercise.

A. If Silence Were Evidence of Guilt, Police Officers Could Unjustly Compel a Suspect's Incriminating Testimony.

The Court has previously described the injustice of using a suspect's post-arrest silence against him, in a narrative that applies with equal force to pre-arrest silence. *Miranda v. Arizona*, 384 U.S. 436, 454 (1966). Consider this scenario, adapted to the pre-arrest context:

A crime has been committed, and the police think they know who might have done it. They have some evidence but know that a confession would seal their case. So the officers go to the suspect's home, ask to speak with him, and confront him with difficult questions. He is not under arrest. The suspect, however, refuses to answer the questions, perhaps even asserting a right to remain silent or saying that he wants to speak with his lawyer.

The officer, however, then "point[s] out the incriminating significance of the suspect's refusal to talk:

> 'Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably

> be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over.'"

Miranda, 384 U.S. at 454 (quoting Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (1962), a manual for police interrogators). As this Court found, "[f]ew will persist in their initial refusal to talk . . . if this monologue is employed correctly." *Id.*

The rationale of the decision below would allow for an even higher level of coercion. Suppose the officer continues, "Joe, you don't have to answer my questions, but if you don't, then that's going to be used as evidence that you're guilty. The prosecutor is going to stand in front of that jury and tell them that an innocent man would answer my questions. So you don't need to talk to your lawyer, you need to answer my questions right now."

After this, very few could or would continue in their initial refusal to speak to the police in light of the damning consequences of their continued silence. Most people would find this police conduct shocking and abusive. But the officer in this example is doing nothing more than correctly stating the law as expressed by the Texas courts below.

B. If Silence Were Evidence of Guilt, Suspects Would Be Subjected to a "Cruel Trilemma."

Even without explicit police coercion, a suspect questioned by the police faces an impossible quandary under the Texas courts' ruling. He can answer the police questions truthfully, possibly incriminating himself in this or other crimes. He can lie to law enforcement, itself often a crime.[3] Or he can remain silent and risk that his silence will be used against him as evidence of his guilt.

The suspect's predicament is a variant of the "cruel trilemma" described in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964). The classic "trilemma" prohibited by the Fifth Amendment is of "self-accusation, perjury or contempt." *Id.* "[A] suspect is 'compelled . . . to be a witness against himself' at least whenever he must face the modern-day analog of the historic trilemma." *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (ellipsis in original) (citation omitted). Such analogs apply whenever there is a compulsion to answer, such as in custodial interrogations, *id.* at 596 n.10, or when there is any threat of a penalty for silence, such as a forfeiture of goods, *Boyd v. United States*, 116 U.S. 616, 634 (1886), losing one's government job, *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967),[4] disbarment, *Spevack v. Klein*, 385

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[3] *See* 18 U.S.C. § 1001.

[4] *Garrity* addressed an inquiry and investigation by the New Jersey Attorney General for a report to the court. 385 U.S. at 494. The questioning in that case was not post-arrest or before

U.S. 511, 515–16 (1967), or a loss of government contracts, *Lefkowitz v. Turley*, 414 U.S. 70, 83–85 (1973).

What matters is not the time when the privilege is asserted, but rather whether an individual "was deprived of his free choice to admit, to deny, or to refuse to answer" by the penalty imposed by the Government. *Garrity*, 385 U.S. at 496 (internal quotation marks omitted). For if the Government imposes a penalty upon an individual's silence, there is no "free choice" and the suspect is compelled, in violation of the Fifth Amendment, to be a witness against himself. *Id.* *Miranda* itself made clear that the state cannot use at trial the defendant's silence in response to custodial police questioning:

> [I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

Miranda, 384 U.S. at 468 n.37.

Under the regime imposed by the Texas courts, a suspect undergoing police questioning faces

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a court or legislative committee, and thus was similar to pre-arrest investigatory questioning by police.

the same compulsion through a cruel trilemma of self-incrimination, lying to police, or an implied admission of guilt. "Any time an individual is questioned by the police, that individual is compelled to do one of two things—either speak or remain silent. If both a person's prearrest speech and silence may be used against that person . . . [he] has no choice that will prevent self-incrimination." *See Wisconsin v. Fencl*, 325 N.W.2d 703, 711 (Wis. 1982).

C. This Court's Precedent Establishes that There Should Be No Punishment for Refusing To Answer Pre-Arrest Police Questions.

The Court has often stated that an individual has the right to refuse to answer police questions, and that this refusal to cooperate does not furnish even minimal justification for punishment. *See Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("[A]n individual may decline an officer's request without fearing prosecution. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." (citation omitted)); *Berkemer v. McCarty*, 468 U.S. 420, 439–40 (1984) ("[T]he detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released." (footnote omitted)); *see also Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring) ("Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . .").

Just as a suspect's silence provides no basis for his arrest, it cannot establish the suspect's guilt at trial. Indeed, the reason these cases forbid using a suspect's silence as justification to arrest, detain, or search a suspect is because that use would punish the suspect's refusal to answer, would render the encounter with police non-consensual, and would in effect compel the suspect's cooperation. The United States, in its *amicus* brief in *Florida v. Bostick*, explained:

> [I]t is clear that law enforcement officers may draw no inference justifying a search or seizure from a refusal to cooperate. That is, officers lacking legal justification to detain a person may not bootstrap noncompliance into justification for a detention, because in that event a citizen would in effect have no way of declining to participate in a "consensual" encounter with the police.

Brief for the United States as Amicus Curiae Supporting Petitioner, *Florida v. Bostick*, (No. 89-1717) 1990 WL 10013126, at *25 (cited approvingly in *Bostick*, 501 U.S. at 437).

A suspect must be free to choose whether or not to cooperate with the police, or his answer by definition is compelled. *See Garrity*, 385 U.S. at 496. Yet when non-cooperation leads to evidence of his guilt—which may itself lead to his arrest—then

there is no free choice and the suspect is compelled to be a witness against himself.

III. THE RIGHT TO REMAIN SILENT PROTECTS THE INNOCENT.

Any use of a defendant's silence as evidence of guilt rests on a fallacy that is anathema to the Fifth Amendment: It presumes that only the guilty would exercise a right to remain silent. That is exactly how the State used Petitoner's silence below, arguing to the jury that, if Petitioner had been innocent, he would have answered the police's questions.

The Court consistently has rejected this pernicious fallacy, stating unequivocally that "one of the Fifth Amendment's basic functions is to protect innocent men who otherwise might be ensnared by ambiguous circumstances." *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (emphasis, ellipses, and internal quotation marks omitted); *Grunewald v. United States*, 353 U.S. 391, 421 (1957) (finding that "no implication of guilt could be drawn from . . . invocation of . . . Fifth Amendment privilege before the grand jury."). "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullmann v. United States*, 350 U.S. 422,426–27 (1956) (footnote omitted).

There are many reasons why an innocent person might choose to remain silent in the face of police questions or accusations. That is why the Court has opined that "[i]n most circumstances silence is so ambiguous that it is of little probative force." *United States v. Hale*, 422 U.S. 171, 176 (1975); *see also* Charles W. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment*, 14 Ga. L. Rev. 27 (1979) (explaining why silence is not a reliable equivalent of an admission of guilt). *Hale* noted several reasons why an arrestee may choose to remain silent, and many of those reasons apply just as strongly to the pre-arrest situation when an innocent person is questioned by police. Under these circumstances,

> innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. . . . [A] suspect may not have heard or fully understood the question, or may have felt there was no need to reply. He may have maintained silence out of fear or unwillingness to incriminate another. Or [he] may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere . . . .

Hale, 422 U.S. at 177 (citation omitted); *see also Marek v. Alabama (Ex parte Marek)*, 556 So. 2d 375, 381 (Ala. 1989) ("Confronted with an accusation of a crime, the accused might well remain silent because

he is angry, or frightened, or because he thinks he has the right to remain silent that the mass media have so well publicized."). Petitioner's case is instructive: The police officers' questions, at first seemingly innocuous, "abruptly pivoted" to focus on Salinas as a suspect. *See* Pet. at 3.

A variety of other innocent reasons may explain a person's silence. One may decide not to respond to police questioning because he is aware of *Miranda* and believes he has a right to remain silent. This right is so well known to members of the public that it is "implausible" "[i]n the modern age of frequently dramatized 'Miranda' warnings" that a "person under investigation may be unaware of his right to remain silent." *Brogan v. United States*, 522 U.S. 398, 405 (1998); *see also Ohio v. Leach*, 807 N.E.2d 335, 342 (Ohio 2004) ("With the proliferation of movies and television shows portraying the criminal justice system, it would be difficult to find a person living in America who has not heard of *Miranda* warnings."); *see Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000) (finding that one of the reasons a defendant may remain silent before arrest is "knowledge of his *Miranda* rights").

Others may stay silent because they do not trust the police. For example, there is little desire in many indigent communities to cooperate with police or to answer their questions. *See, e.g.*, Robert J. Sampson & Dawn J. Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 Law & Soc'y Rev. 777 (1998); *see also United States v. Giraldo*, 743 F. Supp. 152, 154 (E.D.N.Y. 1990)

(taking "judicial notice of the suspicion with which the police . . . are regarded in many poor urban communities"). Such apprehension may have very little to do with whether an individual is guilty of any crime, and far more to do with community fear or distrust of the police.

While innocent of a crime, some may fear that the police would misinterpret their truthful answers. "Often, for example, more than one person may have had a motive to kill the victim in a homicide case, even when only one person has actually killed him." Sherry F. Colb, *The Fifth Amendment Rights of the Innocent*, Findlaw (Mar. 28, 2001) http://writ.news.findlaw.com/colb/20010328.html (last accessed Feb. 26, 2013). Yet providing police with a possible motive would be self-incriminating and could help the police to build their case against an innocent man. *See Reiner*, 532 U.S. at 21 ("[T]ruthful responses of an innocent witness . . . may provide the government with incriminating evidence from the speaker's own mouth.").

Individuals may also choose to stay silent for fear that, no matter what they may say to the police, any contradictions or even perceived contradictions could be used to destroy their credibility if charged with a crime. This is one of the reasons that Professor James Duane advises never to speak to police under any circumstances. *See* James Duane, *Don't Talk to Police (Under ANY Circumstances)* (uploaded Feb. 25, 2012), *available at* http://www.youtube.com/watch?v=CkZf6_jK3Zs (last accessed Feb. 26, 2013). Professor Duane gives the example of an individual who was in another state

the day of a crime, but an eyewitness mistakenly says they saw him in town. *Id.* Even though answering truthfully and completely innocent of any crime, their credibility is now in serious question during any criminal trial. *See also* Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. Sch. L. Rev. 911, 927 (2011) ("Once the defendant puts his credibility on the line by providing a statement and once his credibility is impeached—*whether correctly or not*—the likelihood of conviction soars.").

Individuals also may refuse to answer police questions because the answers may be embarrassing or incriminating with respect to unrelated offenses. *Leach*, 807 N.E.2d at 342 (noting that innocent persons may decline to speak to law enforcement due to "embarrassment about a relationship or course of conduct that is not necessarily criminal"). And some individuals may simply feel that their lives are "none of the officer's business," *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 190 (2004).

IV. USE OF PRE-ARREST SILENCE ALLOWS FOR POLICE ABUSE AND SKEWS THE BALANCE BETWEEN THE INDIVIDUAL AND THE STATE.

A prosecutor's need for evidence is reduced if she can argue that the defendant would have come clean to the police if he were innocent. This kind of evidence "substantially impairs the sense of fair play," *Combs*, 205 F.3d at 285 (internal quotation marks omitted), which requires that the government "shoulder the entire load" in order to maintain a

"fair state-individual balance." *Miranda*, 384 U.S. at 460; *Murphy*, 378 U.S. at 55. By using a suspect's silence as evidence of guilt, the government need not work as hard to develop other evidence, and can instead seek to rely on a jury's readiness to assume—as the prosecutor in this case argued—that an innocent man should be willing to speak to the police.

A. If Silence Were Evidence of Guilt, Police Could Seek To Manipulate Suspects into Incriminating Themselves.

Allowing pre-arrest silence to be evidence of guilt encourages police officers to generate incriminating evidence—entirely lawfully, according to the Texas courts—by questioning the defendant and inducing a refusal to speak. Courts have recognized that because police determine the timing of arrest, a holding that the Fifth Amendment does not apply pre-arrest "would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant's pre-arrest silence as evidence of guilt." *Washington v. Easter*, 922 P.2d 1285, 1290 (Wash. 1996) (en banc); *see also Leach*, 807 N.E.2d at 341 (finding that it "would encourage improper police tactics, as officers would have reason to delay administering *Miranda* warnings so that they might use the defendant's pre-arrest silence to encourage the jury to infer guilt").

Condoning self-incrimination by pre-arrest silence also would incentivize police to employ other strategies to elicit a refusal to answer, rather than a

truthful answer, from a suspect. For example, officers may ask questions in a hostile or discomfiting manner in the hope that the suspect will refuse to answer. Or they can adopt a strategy of surprise. In this case, officers interviewed Petitioner for an hour about other individuals at the party and their motivations before turning the investigation squarely onto Petitioner by asking whether the shotgun from his home would match the shells found at the murder scene. Pet. at 3. Petitioner was silent, and the prosecutor used this to argue that an "innocent person is going to say" something rather than be silent. Pet. at 6. Just as police have been known to use psychological methods to get confessions, *see Miranda*, 384 U.S. at 448–54, the Texas courts' decision would allow such tactics to trigger incriminating silence.

B. Allowing Prosecutors To Use Pre-Arrest Silence Discourages Access to Counsel.

In addition to the entirely innocent reasons for refusing to answer police questions, many individuals choose not to answer questions until they have consulted with a lawyer or have a lawyer present. As just one example, suspects in "white collar" criminal cases are often confronted by law-enforcement when a subpoena is first served. They commonly refuse to answer police questions until they have the chance to confer with an attorney.

But if refusing to answer questions and "lawyering up" results in the police having substantive evidence of guilt, then a suspect will have a strong incentive to answer the police

questions before meeting with his lawyer. As Justice Jackson correctly pointed out: "Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government, knows how helpless he is to protect his client against the facts thus disclosed." *Watts*, 338 U.S. at 59.

Even if advising a client in advance, the lawyer will be in a difficult position. No criminal defense lawyer wants her client to speak with police before receiving legal advice. But at the same time, no lawyer wants her client to provide police with substantive evidence of guilt simply by refusing to answer questions.

C. Allowing Prosecutors To Use Pre-Arrest Silence Chills Exercise of Fifth Amendment Rights at Trial.

When a prosecutor uses pre-arrest silence as evidence of guilt, there is little the defendant can do to respond. There is no alibi witness or physical evidence that the defendant can offer to answer such attacks. The defendant has only two options. He can allow the attack and hope that the jury won't judge him too harshly for not speaking to the police. Or, he can waive his Fifth Amendment right and testify in his own defense, trying to explain the reason why he chose not to speak to the police in the first place. *See Leach*, 807 N.E.2d at 341 ("Use of pre-arrest silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not

to testify and take the stand to explain their prior silence.").

Only the defendant himself can answer the question why he did not talk to police in the first instance. It may be for any of the entirely legitimate and innocent reasons discussed above, *see supra* Part III, but in order to explain that, the defendant must waive all of the Fifth Amendment's protections and expose himself to questioning not just on his refusal to answer, but also on the substance of the alleged crime itself, as well as any prior convictions or criminal conduct that may be admissible under the Rules of Evidence. In the words of the Sixth Circuit, the defendant is "under substantial pressure to waive the privilege against self-incrimination . . . at trial in order to explain the prior silence." *Combs*, 205 F.3d at 285.

Allowing use of pre-arrest silence thus shifts the burden in the Government's favor. It "actually lessens the prosecution's burden of proving each element of the crime," *id.*, and hollows the promise of the Self-Incrimination Clause. *See Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 557–58 (1956) ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent . . . to a confession of guilt . . . .").

D. If Pre-Arrest Silence Were Evidence of Guilt, Prosecutors Would Have Significant Additional Leverage in Plea Negotiations.

Finally, and perhaps most importantly for the majority of criminal defendants, using pre-arrest silence as evidence of guilt gives prosecutors significantly greater leverage in plea bargaining. Roughly 90% of criminal cases end with a defendant's plea.[5] In cases where the evidence is not overwhelming, and where criminal defendants otherwise might be willing to risk a jury trial, prosecutors would have a powerful new tool to convince defendants to accept a plea bargain. The simple fact that a defendant did not answer police questions can be evidence that may persuade some defendants to plead guilty—and some lawyers to advise such a plea—for reasons that may have nothing to do with their innocence or guilt.

The Court should reject such a penalty for silence, and reject any pre-arrest compulsion to choose between self-incrimination through speech and self-incrimination through silence. Such a choice cannot be reconciled with the policies and

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[5] *See* George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 223 (Stanford Univ. Press 2003); *see also Sourcebook of Criminal Justice Statistics Online*, Table 5.22.2010, available at http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last accessed Feb. 26, 2013) (showing that in 2010, 88.9% of all criminal defendants in federal court were convicted by a plea of guilty or *nolo contendere*).

principles underlying the Fifth Amendment. It has no place in our system of justice, which places on the Government the burden of establishing beyond a reasonable doubt that the defendant is guilty of the charged offense.

CONCLUSION

For the foregoing reasons, amici curiae National Association of Criminal Defense Lawyers and Texas Criminal Defense Lawyers Association respectfully request that the decision of the Texas Court of Criminal Appeals be reversed.

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AMICUS CURIAE BRIEF

No. 12-246

In The Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the
Texas Court of Criminal Appeals

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QUESTION PRESENTED

Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* warnings.

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INTEREST OF *AMICI*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. Because the instant case raises important questions about the Bill of Rights and the scope of prosecutorial power, the case is of central concern to the Cato Institute.

SUMMARY OF THE ARGUMENT

Amici submit that prosecutorial comment on pre-arrest silence runs counter to the guarantees of

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* certify that no counsel for a party to this action authored any part of this *amici curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed a letter with this Court consenting to *amicus curiae* briefs on behalf of either party.

the Constitution's Fifth Amendment. The justification for allowing the prosecution to comment on a defendant's refusal to answer law enforcement questions before he has been arrested is the product of an overly simplified and fundamentally flawed premise – that silence in the face of police accusations is probative of a suspect's guilt – that does not stand up to scrutiny. Moreover, such comments can be used against individuals who honestly believe that they have the right to remain silent when confronted with pre-arrest questioning. Recognition of these truths by sustaining the Petitioner's request for reversal of the judgment below is the most faithful reading of the Fifth Amendment's Self-Incrimination Clause and is required to protect citizens for unwarranted convictions based upon invocation of the right to remain silent.

ARGUMENT

I. Prosecutorial Comment on Pre-Arrest Silence is Impermissible, Counter to the Purposes of the Fifth Amendment, and Based on a Faulty Premise.

The idea of a right or privilege against self-incrimination dates back at least to the early seventeenth century's *ius commune* maxim of *nemo tenetur prodere seipsum* (no man is bound to accuse himself).[2] The right is enshrined in the United

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[2] *See* R. H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 185 (1997). The *ius commune* was "the law applied throughout the European continent and in the English prerogative and ecclesiastical courts." *Id.*

States Constitution's Fifth Amendment, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The right has been recognized, in the words of Justice Douglas, as "one of the great landmarks in man's struggle to be free of tyranny, to be decent and civilized."[3]

Encompassed within the Fifth Amendment's self-incrimination clause is the right to remain silent after arrest. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Furthermore, the State may not use a defendant's failure to testify or to respond to custodial questioning at trial. *Griffin v. California*, 380 U.S. 609, 615 (1965). The basis for this "essential feature of our legal tradition," *Mitchell v. United States*, 526 U.S. 314, 330 (1999), is as equally applicable to prosecutorial comment on a defendant's pre-arrest silence as it is to his post-arrest silence because it implicates the same concerns. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 193 (2004) (Stevens, J., concurring) ("[T]here is no reason why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser [Fifth Amendment] protection."). Regardless of whether an individual has been formally arrested or not, the principle remains the same: it is a "settled principle" that "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969). *See also United States v. Drayton*, 536 U.S. 194, 197 (2002)

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[3] WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 238 (1954).

(recognizing the "right not to cooperate" with law enforcement).

Respondent's position, that the State may comment on pre-arrest silence, effectively nullifies these time-honored principles and guts to right not to cooperate. If pre-arrest silence is admissible as substantive evidence, an individual can remain silent (and risk that his silence will be used against him), or he can talk. Such a choice is constitutionally impermissible. As the Court of Appeals for the Seventh Circuit recognized more than a quarter of a century ago, "there is . . . a constitutional right to say nothing at all about the allegations," and the use of a defendant's silence to imply guilt is "nothing short of incredible, given the language of our constitution and the interpretation it has consistently been given." *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987). Moreover, it is illogical that prosecutors should have greater leeway to comment on an individual's silence during pre-arrest questioning when there is less than probable cause for an arrest than when probable cause exists.[4]

In addition to the constitutional infirmities of prosecutorial comment on pre-arrest silence, the purported justification for such comment is misplaced and stems from the fundamentally flawed premise that pre-arrest silence is somehow indicative of guilt. Respondent's theory goes that

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[4] This Court has observed that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

when an individual is faced with a question that might incriminate him, an innocent individual will always say something in response. But this is simply not the case. As Chief Justice Burger stated, it is not any more probable that the innocent rather than the guilty protest their innocence. *See United States v. Hale*, 422 U.S. 171, 181 (1975) (Burger, J., concurring) ("It is no more accurate than to say, for example, that the innocent, rather than the guilty, are the first to protest their innocence. There is simply no basis for declaring a generalized probability one way or the other."). Such a view also ignores the fact that the Fifth Amendment "serves as a protection to the innocent as well as the guilty." *Ullman v. United States*, 350 U.S. 422, 427-28 (1956) (internal citation omitted).

Indeed, there are numerous reasons why an individual questioned by law enforcement may choose to remain silent, many of which are consistent with innocence. For example, as this Court recognized over a century ago, a defendant who is "entirely innocent of the charge against him" may choose not to speak due to "[e]xcessive timidity," "nervousness when facing others and attempting to explain transactions of a serious character," or that answering would "confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." *Wilson v. United States*, 149 U.S. 60, 66 (1893).[5] Alternatively, the invocation of silence may have nothing to do with the

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[5] For cases discussing the numerous reasons a defendant might remain silent for reasons that are not incriminating, *see, e.g.*, *Hale*, 422 U.S. at 177, and *Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000).

defendant's individual wish. *See Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring) ("[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."). Because of this, "[i]n most cases, it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence." *People v. De George*, 541 N.E.2d 11, 13 (N.Y. 1989). Consequently, the "underlying premise, that an innocent person *always* objects when confronted with a baseless accusation, is inappropriately simple, because it does not account for the manifold motivations that an accused may have when, confronted with an accusation, he chooses to remain silent." *Ex parte Marek*, 556 So. 2d 375, 381 (Ala. 1989).

Recognizing these concerns, this Court has held that silence during and after arrest is ambiguous and irrelevant to establish an inference of guilt. *Doyle v. Ohio*, 426 U.S. 610, 617 (1976). However, silence is no more probative of guilt because it takes place before – in some instances, by a matter of seconds – an individual is read his *Miranda* rights, and frequently these same motivations to remain silent are just as inherent during the pre-arrest stage as the post-arrest stage. It therefore follows that pre-arrest silence is as "insolubly ambiguous" as post-arrest silence. *Id.* Put simply, the *Miranda* warning "makes it a poor dividing line for determining the admissibility of silence."[6]

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[6] Note, *Manipulating* Miranda: United States v. Frazier *and the Case-in-Chief Use of Post-Arrest, Pre-*Miranda *Silence*, 92 CORNELL L. REV. 1013, 1034 (2007).

If the ambiguity of pre-arrest silence and the unknown reason(s) for a defendant's silence make it untrustworthy as evidence is not troubling enough, the harm to defendants is multiplied because juries are likely to attach disproportionate and prejudicial weight to a prosecutor's comments concerning a defendant's pre-arrest silence. For example, in *Hale*, the Court held that use of the defendant's silence for impeachment purposes was improper because of the risk the jury would assign much more weight to it than was warranted. 422 U.S. at 180. Even where a defendant's silence is innocent, "[t]he layman's natural first suggestion would probably be that the resort to [silence] in each instance is a clear confession of crime." *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978).[7] This concern is by no means hypothetical, but is supported by empirical studies that illustrate that juries do not distinguish between silence as evidence of the untrustworthiness of a defendant's exculpatory trial testimony and silence as substantive evidence of guilt.[8] Consequently, "[t]his uncontrollable and immeasurable inference of guilt makes the use of prearrest silence inherently prejudicial, outweighing any possible relevance prearrest silence may possess."[9]

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[7] *See also Mitchell*, 526 U.S. at 329 ("Too many, even those who should be better advised . . . too readily assume that those who invoke [the right to remain silent] are either guilty of crime or commit perjury in claiming the privilege.") (quoting *Ullman*, 350 U.S. at 426).

[8] *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 127-28, 177-80 (1966).

[9] Debra M. Williamson, *What You Do Not Say Can and Will Be Used Against You: Prearrest Silence Used to*

In sum, not only is the logic in allowing prosecutorial comment on pre-arrest silence overly simple and fundamentally flawed, it is incompatible with the premise that a defendant is innocent until proven guilty. Because of the weight jurors are likely to attach to such comments, it enhances the risk of wrongful convictions.

II. Individual Reliance on Pre-Arrest Silence Has Become an Entrenched Norm.

Respecting our citizenry's deeply entrenched understanding of the right to remain silent provides further support for prohibiting prosecutorial comment on pre-arrest silence. The right to remain silent is perhaps the Constitution's most widely known (or at least widely quoted) right. American citizens are exposed to it on a daily basis through numerous police and law dramas. Indeed, the Court of Appeals of Maryland recognized that the public understands "that any statement made in the presence of police 'can and will be used against you in a court of law.'" *Weitzel v. State*, 863 A.2d 999, 1004 (Md. 2004). *Miranda*'s ubiquity means that "[i]t is unlikely that suspects today hear the *Miranda* rights for the first time" from an arresting officer.[10] One study from the mid-1990s found that 80 percent of American knew that they had a right to remain silent before they were given *Miranda*

Impeach a Defendant's Testimony, 16 VAL. U. L. REV. 537, 561 (1982).

[10] Richard A. Leo, *Criminal Law: The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 651 (1996).

warnings.[11] Consequently, "the average citizen is almost certainly aware that any words spoken in police presence are uttered at one's peril. While silence in the presence of an accuser or non-threatening bystanders may indeed signify acquiescence in the truth of the accusation, a defendant's reticence in police presence is ambiguous at best." *Id.* at 1005. However, although a basic understanding of *Miranda* warnings has become entrenched in American culture, many citizens are unlikely to appreciate the distinction between pre- and post-arrest silence, instead believing that any interaction with law enforcement personnel triggers the right to remain silent.[12] Respecting such entrenched norms is especially important when an individual's liberty is at stake.

Not only does respecting this entrenched cultural norm represent a fair social contract, it chimes with the original meaning of the Fifth Amendment's pro-defendant protections.[13] The original understanding of the right to remain silent was that it first attached "not upon the reading of a *Miranda*-like incantation, but when the defendant

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[11] *See* Note, *The Original Public Meaning of the Fifth Amendment and Pre-*Miranda *Silence*, 98 VA. L. REV. 897, 908 n.6 (2012) (citing SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990, at 51 (1993)).

[12] *See* Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 142 (2001).

[13] *See* Note, *The Original Public Meaning of the Fifth Amendment*, *supra* note 11, at 902-03 ("Perhaps surprisingly, the original meaning [of the Fifth Amendment] was highly protective of potential criminal defendants.").

reasonably believed that her statement might be used against her at a criminal trial or lead the investigator to inculpatory evidence."[14] Indeed, the Framers embraced the right to "refus[e] to answer" pretrial inquiries "without formal prejudice or penalty."[15]

The same concerns that undergirded the original meaning are equally applicable today. Upon interaction with law enforcement personnel, many citizens are likely to be wary that anything they say can be used against them in subsequent criminal proceedings and are therefore likely to remain silent. What they are less likely to be familiar with, however, is that their pre-arrest silence can be used against them at trial.[16] Because many individuals likely believe that they have "the right to remain silent" upon interaction with law enforcement personnel, permitting prosecutors to comment on pre-arrest silence would dramatically alter the status quo. Allowing prosecutorial comment on pre-arrest silence also creates a perverse incentive for law enforcement personnel to delay the time before *Miranda* warnings are given in order to allow the

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[14] *Id.* at 901.

[15] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 313 (1968).

[16] *See* Note, *Manipulating* Miranda, *supra* note 6, at 1035-36 ("[I]t seems erroneous to believe that suspects are aware of or may exercise their right to remain silent only at the point the police actually advise them of that right. In a sense, popular culture has given most Americans their *Miranda* warnings well in advance of their arrest.").

admission at trial of prejudicial pre-arrest silence.[17] This is particularly disconcerting when, as here, an individual's liberty is at stake.

CONCLUSION

As this Court held in *Miranda*, "[t]he prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." *Miranda*, 384 U.S. at 468 n.37. The same principles applied nearly half a century ago are equally applicable here. Prohibiting the use of a defendant's silence during the State's case-in-chief, but allowing it for impeachment purposes, balances the rights of defendants and the Government's need to try cases effectively. To hold otherwise would eviscerate the constitutional protections that our nation's citizens are entitled to and have come to rely upon.

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[17] *See id.* at 1036-37 ("Under the current system [allowing prosecutorial comment on pre-arrest silence], an enterprising officer may expand the time window during which silence is admissible by delaying custodial interrogation and thus delaying the need to administer *Miranda* warnings.").

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AMICUS CURIAE BRIEF

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IN THE
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GENOVEVO SALINAS,
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STATE OF TEXAS.
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On Writ of Certiorari to the
Court of Criminal Appeals of Texas

Brief of Wayne County, Michigan as Amicus Curiae in Support of Respondent

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Question Presented

I.

Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.

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246 F.3d 1036 (CA 7, 2001).....16

Portuondo v Agard,
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United States v. Campbell,
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United States v. Caro,
637 F.2d 869 (CA 2,. 1981).....16

United States v. Hernandez,
948 F.2d 316 (CA 7, 1991).....16

United States v. Oplinger,
150 .3d 1061 (CA 8, 1998).....16

United States v. Rivera,
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United States v Whitehead,
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People v McReavy,
436 Mich. 197, 462 N.W.2d 1 (1990).....19

People v Schollaert,
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Other

Alschuler, "A Peculiar Privilege in Historical Perspective: The Right to Remain Silent," 94 Mich. L. Rev. 2625, 2638 (1994).....7

Friendly, *Benchmarks*, p. 271 (1967).....8

Grano, *Confessions, Truth, and the Law* (1993).....3,8,10

Langbein, The Privilege and Common Law Criminal Procedure, in The Privilege Against Self-Incrimination 82, 92 (Helmholz et al. eds.1997).....14

Levy, *The Origins of the Fifth Amendment (2d Ed)* (MacMillan: 1986).....5

Rossum, "'Self-Incrimination': The Original Intent," in Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (University of Virginia Press: 1991).....3

J. Stephen, 1 *History of the Criminal Law of England* 440 (1883).....5

Wigmore, "The Privilege Against Self-Incrimination: Its History," 15 Harv. L. Rev. 610, 621-24 (1902).....5, 7

Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within her jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties. And, as indicated in the brief, Michigan law currently holds that use of pre-arrest silence of the accused substantively violates no constitutional right.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties. No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Summary of Argument

The Fifth Amendment, both in its text and its history, protects citizens from being "compelled" to be "witnesses against" themselves. The sine qua non for involvement of the Fifth Amendment is thus coercive governmental activity.

There is no such thing as a "right to silence." There is, rather, a right not to be compelled to speak. "Right to silence" is not simply a shorthand for "right not to be compelled," as the former, which is not the text of the Fifth Amendment, raises issues of knowing and intelligent waiver, while the right protected by the Fifth Amendment is unwaivable (one cannot agree to be coerced). If a right to silence existed, noncustodial admissions to governmental officials, initiated by the confessor, would be inadmissible without a showing of a proper waiver of the "right to silence."

When one speaks or remains silent in the absence of governmental compulsion to do either, the Fifth Amendment is irrelevant. Admission of evidence of silence that is not compelled raises no constitutional question, being purely a matter of state evidentiary law. The Criminal Court of Appeals of Texas should thus be affirmed.

Argument

Prearrest Silence May be Used As Substantive Evidence

A. The Fifth Amendment in History

> *"...the Fifth Amendment actually means what it says."*[1]

It is generally wise to begin consideration of the meaning of a constitutional text by reviewing the actual language of the constitutional provision at issue, for reference only to the judicial gloss which has been given the relevant language can lead one far astray. As has been noted in a different context,

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.[2]

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[1] Joseph Grano, *Confessions, Truth, and the Law* (University of Michigan Press: 1993), p.143.

[2] United States v. 12 200-Foot Reels of Super 8mm. Film, 413 US 123, 127, 93 S.Ct. 2665, 668, 37 L

Amicus thus begins with the relevant text.

> No person . . . shall be compelled in any criminal case to be a witness against himself, .

A discussion of the permissibility of testimony regarding silence of the defendant, whether before arrest, after arrest, or during trial, as against the protection of the Fifth Amendment against *compelling* one to be a "witness against himself," seems odd when one takes account of history. Though it seems almost astounding today, at the time of the Founding, and of the ratification of the Bill of Rights, *no* state even *permitted*, much less compelled, an accused in a criminal case to testify. It was not until 1864 that Maine became the *first* state to permit criminal defendants to testify, and Congress followed suit in 1878.[3] But criminal defendants were not actually silent at their trials, they simply were not competent as sworn witnesses. Instead, the defendant was permitted—and expected—to give an unsworn statement at trial on his own behalf, and was also expected to give a statement pretrial. The failure to make a statement to the justice of the peace

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Ed 2d 500 (1973).

[3] See Ralph Rossum, "'Self-Incrimination': The Original Intent," in Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (University of Virginia Press: 1991), p.276.

would be reported to the jury.[4] As Sir James Stephen noted, evidence given against the defendant operated as "so much indirect questioning," and if the defendant "omitted to answer the questions it suggested he was very likely to be convicted."[5] If, then, a defendant was not permitted to be a witness at trial, but was expected to make unsworn statements, the failure to do so to be held against him, why, then, the inclusion of the Fifth Amendment protection against compelled self-incrimination in criminal cases?

Some scholars, Leonard Levy principal among them, take the view that the Founders, and the members of state constitutional conventions which enacted similar protections on which the Fifth Amendment was based, "failed to say what they meant," for if they meant what they said, then the common-law prohibition on testimony from the accused in criminal cases rendered the Fifth Amendment superfluous.[6] Instead, concluded Levy, what those individuals drafting state Bill of Rights and the Fifth Amendment actually *meant* to do was

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[4] Langbein, "The Privilege and Common Law Criminal Procedure," in *The Privilege Against Self-Incrimination*, quoted by Justice Scalia, dissenting, in *Mitchell v United States*, 526 US 314, 119 S Ct 1307, 143 L Ed 2d 424 (1999).

[5] J. Stephen, 1 *History of the Criminal Law of England* 440 (1883).

[6] See Levy, *The Origins of the Fifth Amendment (2d Ed)* (MacMillan: 1986).

adopt the common-law right of *nemo tenetur seipsum acusare* (no one is bound to accuse himself), which protected not only against courts in criminal cases but against all of government, in all kinds of actions, protecting witnesses as well as the accused, and protecting against "threats of criminal liability, civil exposure, and public obloquy."[7] This redrafting of the Fifth Amendment is not tenable.

Professor Rossum nicely notes that Levy and his followers fail to take account of the very real probability—given the express language of the Fifth Amendment—that the drafters were not writing to "end some current abuse but simply to provide a floor of constitutional protection above which the common law was free to operate but below which it could not go."[8] Though it seems quaint now, during the 17th century the very giving of an *oath* was held itself to be a coercive act, and the ecclesiastical Court of High Commission engaged in the practice of summoning those with nonconformist opinions and requiring them to take an oath and answer questions. Refusing the oath resulted in contempt and Star Chamber proceedings; lying under oath was perjury; telling the truth under oath could subject one to prosecution for political and religious crimes. The celebrated trial of John Lilburne, a Puritan agitator who refused to take the oath, led to the prohibition of the administration of any oath obliging a person "to confess or accuse himself or herself of any

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[7] See Rossum, at 276.

[8] Rossum, at 277.

crime."[9] Professor Albert Alschuler concludes that the history of the Fifth Amendment is "almost entirely a story of when and for what purposes people would be required to speak under oath."[10]

Requiring an oath of the criminally accused was coercive, and banned for that reason, as being equivalent to torture and the rack. Manuals which instructed justices of the peace on the conduct of their office warned, from the late 16th century through the mid- 19th century, that "[t]he law of England is a Law of Mercy, and does not use the Rack or Torture to compel criminals to accuse themselves....I take it to be for the Same Reason, that it does not call upon the Criminal to answer upon Oath. For, this might serve instead of the Rack, to the Consciences of Some Men, although they have been guilty of offenses...."[11] To put the matter finely, then, the purpose of the Fifth Amendment, when understood in its historical context, was "to outlaw torture and improper methods of interrogation," including the compelling of testimony under oath.[12] Put another way, the purpose of the Fifth Amendment was to preclude

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[9] See Wigmore, "The Privilege Against Self-Incrimination: Its History," 15 Harv L Rev 610, 621-24 (1902).

[10] Alschuler, "A Peculiar Privilege in Historical Perspective: The Right to Remain Silent," 94 Mich L Rev 2625, 2638 (1994).

[11] See Alschuler, at 2648.

[12] Alschuler, at 2631.

the obtaining of statements or testimony from the accused in criminal cases by use of *coercive governmental conduct*.[13]

B. Silence

> *. on any view the Fifth Amendment does not forbid the* ***taking*** *of statements from a suspect; it forbids* ***compelling*** *them. That is what the words say, and history and policy unite to show that is what they meant. Rather than being a 'right of silence,' the right, or better the privilege, is against being compelled to speak. The distinction is not mere semantics; it goes to the very core of the problem.*[14]

(1) The unintelligibility of a "right to silence"

A large part of the analytical difficulty in considering the Fifth Amendment and admissibility of silence is the transmogrification of the right not

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[13] Though amicus beheves that consideration of the voluntariness of extra-judicial confessions is a matter of due process, rather than the Fifth Amendment, see generally, Grano, *Confessions, Truth, and the Law* (1993), that distinction appears to have been lost in the decisions, and is not important for purposes here.

[14] H. Friendly, *Benchmarks*, p. 271 (1967) (emphasis in the original).

to be compelled to be a witness against oneself into a "right to remain silent." The latter is not simply a shorthand expression for the former, as recognized by Judge Friendly, as it imports necessarily a waiver analysis foreign to the text and history of the Fifth Amendment. The sine qua non for involvement of the Fifth Amendment is coercive governmental conduct.[15] In the absence of coercive conduct by a governmental official, the fact that an individual speaks or does not speak, whether to some other "ordinary citizen" or even to a governmental official, has nothing to do with the Constitution. When one speaks voluntarily, he or she is not waiving his or her Fifth Amendment right not to be compelled to speak, the only right protected by the Fifth Amendment; rather, the speech is voluntary. If coerced, and by a governmental agent, the Fifth Amendment applies. But plainly no one, in speaking with a governmental agent, is saying, in effect: "Yes, I understand that I have a right not be compelled to speak, but I choose to waive that right, and wish to be compelled to speak, so you may now proceed to engage in some coercive activity in order to gain my verbal cooperation." Rather, if the consent to speak is not voluntary, then the individual has been compelled, and his or her statements are barred from admission at trial. But it is logically impossible to waive the right not to be compelled to speak, and this is what the Constitution protects, not any free floating "right to silence" without regard to coercive governmental conduct. There is

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[15] *Colorado v Connelly*, 479 US 157, 107 S Ct 515, 93 L Ed 2d 473 (1986).

no right to silence which must be waived knowingly and intelligently, there is an unwaivable right not to be coerced.[16]

A hypothetical situation demonstrates this point as well. Under the First Amendment, no person may be forced by the government to pray or to attend church. When millions of citizens choose voluntarily to pray or to attend the church of their choice, are they thereby surrendering their "right not to pray" or "right not to attend church," and must they do so knowingly and intelligently in the constitutional sense? Of course not: the question makes no sense unless in the context of a claim of governmental coercion. There is no "right not to pray," or "right not to go to church" under the Constitution, there is rather a right not to be forced to do either by the government (or to be forced to refrain from either). There is also no "right to remain silent"; instead, there is a right not to be compelled to speak by the government, and speaking in the absence of compulsion is no more

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[16] As Professor Grano has cogently put the matter, " .while the notion of waiving a right to silence is intelligible, the notion of waiving the a right not to be compelled, especially when compel is a synonym for coerce, is not . . . . If the Fifth Amendment really conferred a substantive or formal right of silence, the police, contrary to what even *Miranda* recognized, might have to stop and caution 'a person who enters a police station and states that he wishes to confess,' for the issue whether the right to silence was knowingly waived would be present in all such cases." Grano, *Confessions, Truth, and the Law*, at 142.

the waiver of a constitutional right than is praying or attending church without compulsion.

(2) Evidentiary use of silence

Justice Stevens statement concurring in *Jenkins*[17] that "....the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak" is both cogent and correct. This Court has never held that comment on silence before arrest,[18] after arrest but before Miranda warnings,[19] or after arrest and after Miranda warnings, violates the Fifth Amendment. The Court, rather, has held that only comment on silence after arrest and *after* Miranda warnings violates due process:

> while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to

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[17] *Jenkins v Anderson*, 447 US 231, 241, 100 S Ct 2124, 2131, 85 L Ed 2d 86 (1980)(Stevens, J., concurring).

[18] *Jenkins v Anderson, supra*.

[19] *Fletcher v Weir*, 455 US 603, 102 S Ct 1309, 71 L Ed 2d 490 (1982).

impeach an explanation subsequently offered at trial.[20]

But where an "implicit assurance" that silence will not be used in any ways is *not* given—that is, the comment is on silence even after arrest but before Miranda warnings—no constitutional issue arises.

In *Fletcher v Weir* petitioner was cross-examined regarding why, *after arrest* but before Miranda warnings, he had not offered the exculpatory version of events that he had offered at trial, and in *Brecht v Abrahamson*[21] the Court observed that "the Constitution does not prohibit the use for impeachment purposes of a petitioner's silence prior to arrest..., or after arrest if no Miranda warnings are given....Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty."

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[20] *Doyle v Ohio*, 426 US 610, 618-619, 96 S Ct 2240,2245, 49 L Ed 2d 91 (1976). But see *Portuondo v Agard*, 529 US 61, 120 S Ct 1119, 146 L Ed 2d 47 (2000), where the Court, in upholding comment that petitioner testified after his witnesses giving him the opportunity to tailor his testimony, said that "Although there might be reason to reconsider *Doyle*, we do not do so here."

[21] *Brecht v Abrahamson*, 507 US 619, 628, 113 S Ct 1710, 123 L Ed 2d 353 (1993).

The rule of Doyle v Ohio[22] is built on Griffin v California,[23] which bars comment on the defendant's decision not to testify on the basis that such comments violate the Fifth Amendment. This notion is, as indicated above, contrary to the text and history of the Amendment. To reiterate, pretrial procedure in colonial America was governed by the Marian Committal Statute, which provided:

> [S]uch Justices or Justice [of the peace] before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination....

The justice of the peace testified at trial as to the content of the defendant's statement; if the defendant refused to speak, this would also have

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[22] *Doyle v Ohio*, 426 US 610, 96 S Ct 2240, 49 L Ed 2d 91 (1976).

[23] *Griffin v California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

been reported to the jury.[24] And Justices of the peace continued pretrial questioning of suspects, whose silence continued to be introduced against them at trial, after the ratification of the Fifth Amendment.[25]

Doyle's decision to ban reference to an accused's silence after receiving Miranda warnings was not without its dissenters. Justice Stevens objected that "there is nothing deceptive or prejudicial to the defendant in the Miranda warning. Nor do I believe that the fact that such advice was given to the defendant lessens the probative value of his silence, or makes the prosecutor's cross-examination about his silence any more unfair than if he had received no such warning."[26] And the majority in Portuondo v Agard, permitting comment on defendant's presence in the

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[24] Langbein, The Privilege and Common Law Criminal Procedure, in The Privilege Against Self-Incrimination 82, 92 (Helmholz et al. eds.1997).

[25] See See, *e.g.*, Fourth Report of the Commissioners on Practice and Pleadings in New York-Code of Criminal Procedure xxviii (1849); 1 Complete Works of Edward Livingston on Criminal Jurisprudence 356 (1873), referenced by Justice Scalia in *Mitchell*. See also Justice Scalia's further discussion of the illogic of the *Griffin* decision, concluding that *Griffin* was a "wrong turn" in constitutional jurisprudence, and Justice Thomas"s call for a "reexamination" of *Griffin* in his opinion in *Mitchell*.

[26] *Doyle*, at 426 U.S. 610, 621, 96 S.Ct. 2240, 2246 (Stevens, J., dissenting).

courtroom throughout all the testimony, observed that "Although there might be reason to reconsider Doyle, we need not do so here."[27] But Griffin and its progeny, including Doyle, stray so far from text and history that revisiting them, and overruling at least Doyle, is appropriate.[28]

Because the defendant here was under no official compulsion either to speak or to remain silent, evidence of and comment on his silence does not implicate the Fifth Amendment in any way; because the comment was on silence before Miranda warnings were given or required, the comments and testimony do not implicate due process. The question of admissibility is entirely an evidentiary one under state law.

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[27] *Portuondo v. Agard*, 529 U.S. 61, 74, 120 S.Ct. 1119, 1128 (2000) (emphasis added).

[28] This undertaking should not be blocked by principles of *stare decisis*. See *Arizona v Gant*, 556 US 332, 129 S Ct 1710, 173 L Ed 2d 485 (2009); *Montejo v Louisiana*, 556 US 778, 129 S Ct 2079, 173 L Ed 2d 955 (2009), and especially *Crawford v. Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004), demonstrating that this Court has, on occasion, revisited its jurisprudence on concluding that its holdings have become divorced from the original understanding of the right at issue.

(3) Silence as substantive evidence in the federal circuits

Federal circuits are divided on the question of whether silence that, when used for impeachment violates nothing in the constitution, violates the constitution when used as substantive evidence.[29] And there is a difference between use of

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[29] The First, Second, Sixth, Seventh, and Tenth Circuits have held that substantive use of silence that is permissible for impeachment violates the constitution; on the other hand, the Fifth, Eighth, Ninth and Eleventh Circuits have held to the contrary, though the Ninth Circuit has held that post-arrest/pre-Miranda silence cannot be used substantively. See *United States ex rel. Savory v. Lane*, 832 F2d 1011 (CA 7, 1987); *United States v. Hernandez*, 948 F2d 316 (CA 7, 1991); *Ouska v. Cahill-Masching*, 246 F3d 1036 (CA 7, 2001); *Coppola v. Powell*, 878 F2d 1562, 1568 (CA 1, 1989); *United States v. Burson*, 952 F2d 1196, 1201 (CA 10,. 1991) ; *United States v. Caro*, 637 F2d 869 (CA 2,. 1981); *Combs v. Coyle*, 205 F3d 269 (CA 6,. 2000); but compare *United States v. Rivera*, 944 F2d 1563 (CA 11, 1991); *United States v* Zanabria, 74 F3d 590 (CA 5, 1996); *United States v. Campbell*, 223 F3d 1286 (CA 11, 2000); *Vick v. Lockhart*, 952 F2d 999 (CA 8, 1991) ; *United States v. Zanabria*, 74 F3d 590, 593 (CA 5, 1996); *United States v. Oplinger*, 150 .3d 1061 (CA 8, 1998). The Ninth Circuit has now held that only pre-arrest silence is admissible as substantive evidence, but not post-arrest/pre-Miranda silence, which is admissible only for impeachment. See *United States v Whitehead*, 200 F3d 634 (CA 9, 2000); *United States v Velarde-Gomez*, 269 F3d 1023 (CA 9, 2001).

evidence of any sort to *establish* the State's case-in-chief as opposed to the use of evidence *in* the State's case-in-chief, a point missed by some cases and commentators. Though use of the defendant's pre-arrest or post-arrest but pre-Miranda silence generally occurs either on cross-examination of the petitioner or in rebuttal to impeach his or her credibility, or in the case-in-chief as substantive evidence, generally in the context that silence indicates an admission or acquiescence, it is quite possible for silence to be employed as impeachment of the exculpatory (and false) statement made by the defendant to the police.

But even where silence of the petitioner *is* employed as substantive evidence in the case-in-chief, not to impeach the defendant or his defense, but to *prove* the case-in-chief, how can evidence that violates no constitutional principle when admitted as impeachment violate a constitutional principle when employed as substantive evidence? After all, evidence taken in violation of the "actual" Fifth Amendment; that is, that is compelled, even compelled as a matter of law through a grant of immunity rather than through the use of physical force, is admissible for *no* purpose, not even impeachment.[30]

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[30] "The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless petitioner, but it is no less compelled. ...we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible....A person's testimony

Those courts that have concluded that either pre-arrest or post-arrest/pre-Miranda silence (or both) cannot be employed as substantive evidence have fallen into the analytical error of transmogrifying the right against compelled self-incrimination into a right to silence. The Ninth Circuit, for example, has said that *any* silence after arrest, even before Miranda warnings and before questioning by the police, is an "exercise of the right to silence," comment upon which as substantive evidence is unconstitutional[31]—and note that even this holding would not apply here, as the defendant was *not* under arrest at the time of his silence to the particular question involved here. That court has not explained how the Fifth Amendment violation that occurs when the evidence is used substantively disappears when it is used for impeachment. By this analysis that court has excluded what is often called "demeanor evidence" when used substantively, on the ground that demeanor coupled with silence is a part of the exercise of the "right to silence,"[32] an error that the Michigan Supreme Court has avoided.[33]

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before a grand jury under a grant of immunity cannot constitutionally be used to impeach him when he is a petitioner in a later criminal trial." *New Jersey v Portash*, 440 US 450, 459, 99 S Ct 1292, 1297, 59 L Ed 2d 501 (1979).

[31] See *United States v Whitehead, supra.*

[32] See *United States v Velarde-Gomez, supra.*

[33] *People v McReavy*, 436 Mich 197, 462 NW2d 1 (1990).

The Michigan Court of Appeals in *People v Schollaert* captured the essence of the constitutional implications of "silence":

> In the present case, defendant's silence or non-responsive conduct did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda* warnings. Therefore, we believe that defendant's silence, like the "silence" of the defendant in *McReavy*, was not a constitutionally protected silence. On the basis of our reading of the Michigan Constitution, together with developments in Fifth and Fourteenth Amendment jurisprudence, we conclude that defendant's constitutional rights were not violated when evidence of his silence was admitted as substantive evidence.[34]

As the court recognized, for "silence" to implicate either the Fifth Amendment or due process that silence must be in reliance on Miranda warnings, or during custodial interrogation (where Miranda warnings should have been given and waived as a condition precedent to the questioning). The admissibility of silence that is unrelated to any official compulsion to speak is, as a matter of constitutional law, simply a matter of state

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[34] *People v Schollaert*, 194 Mich App 158, 166-167, 486 NW2d 312 (1992).

evidentiary law. The Criminal Court of Appeals of Texas should be affirmed.

Conclusion

Wherefore, the Petitioner submits that the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted,

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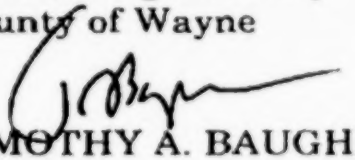
County of Wayne



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